82-1320

No.

Office-Supreme Court, U.S.
FILED
FEB 4 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FIDELITY SAVINGS AND LOAN ASSOCIATION,
Petitioner,

VS.

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARRY D. HOVIS
THOMAS G. REDDY
M. JANICE SMITH
ANGELL, HOLMES & LEA
115 Sansome St., Suite 1400
San Francisco, CA 94101

STEPHEN L. KOSTKA
(COUNSEL OF RECORD)
PALMER BROWN MADDEN
LINDA AGERTER
VAN VOORHIS & SKAGGS
1855 Olympic Blvd., Suite 111
Post Office Box V
Walnut Creek, CA 94596-1270
Telephone: (415) 937-8000
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Where a state savings and loan commissioner has appointed the Federal Savings and Loan Insurance Corporation state receiver for a state-chartered savings and loan association under 12 U.S.C. § 1729(c)(1), may the Federal Home Loan Bank Board preempt the state receivership by appointing the Federal Savings and Loan Insurance Corporation federal receiver even though the statutory preconditions prescribed by Congress for federal preemption under 12 U.S.C. § 1729(c)(2) do not exist?

2. Are the principles of comity and federalism underlying 12 U.S.C. § 1729 contravened by the appellate decision which permits the Federal Home Loan Bank Board to impose a federal receivership and oust state authorities of jurisdiction simply because the Federal Savings and Loan Insurance Corporation had been appointed state receiver?

3. May the Federal Home Loan Bank Board, consistent with the requirements of due process, "federalize" a state receivership created under 12 U.S.C. § 1729(c)(1) in order to deprive the state-chartered association of the procedural and substantive protections it enjoys under state law, and eliminate shareholders' interests by selling the seized association's assets without any prior notice or hearing?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fidelity Savings and Loan Association[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 8, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is sought to be reviewed, is reported at 689 F.2d 804 (1982), and is reprinted in the Appendix at A-2-25. The prior opinions of the United States District Court for the Northern District of California are reported at 540 F. Supp. 1374 (1982), and are reprinted in the Appendix at A-28-54.

JURISDICTION

The Court of Appeals issued its opinion and judgment in this action on September 2, 1982. That court issued an order denying petitioner's petition for rehearing and suggestion for rehearing en banc on November 8, 1982. A-1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The primary statutory provision involved in this case is section 406 of the National Housing Act, 12 U.S.C. § 1729 (c)(1) and § 1729(c)(2). Section 1729(c)(1) sets forth the specific circumstances under which the Federal Savings and Loan Insurance Corporation may act as state-appointed receiver of a state-chartered savings and loan association. Section 1729(c)(2) sets forth the preconditions for federal preemption of a state-appointed receivership, and the Federal Home Loan Bank Board's appointment of the Federal Savings and Loan Insurance Corporation as

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[1]Fidelity Savings and Loan Association is wholly owned by Fidelity Financial Corporation, a holding company.

federal receiver for state-chartered savings and loan associations:

12 U.S.C. § 1729(c): Powers of Corporation and Federal Home Loan Bank Board on default of other institutions.

(1) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are hereby tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) with respect to Federal savings and loan association. If the Corporation is not so appointed it shall pay the insurance as provided in section 405 [§ 1728 of this title], and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.

(2) In the event the Federal Home Loan Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 5(d) of the Home Owners' Loan Act of 1933 [§ 1464(d) of this title], existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

Other provisions of Home Owners Loan Act, 12 U.S.C. §§ 1461 *et seq.*, and Title IV of the National Housing Act, 12 U.S.C. §§ 1724 *et seq.* referred to in this Petition are reprinted in the Appendix at A-55-66.

The due process clause of the Fifth Amendment to the Constitution of the United States provides, in pertinent part, that no person shall "be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. The Facts

This is an action to remove the Federal Savings and Loan Insurance Corporation ("FSLIC") as federal receiver appointed under 12 U.S.C. § 1729(c)(2) over Fidelity Savings and Loan Association ("Fidelity"), a state-chartered savings and loan association. Fidelity was chartered in 1921 under the provisions of sections 5500-5515 of the California Financial Code. At the time the receiver-

ship was created, Fidelity had 80 branches in Northern California and assets of $2.9 billion.

The events which led to the receivership of Fidelity began in the Fall of 1979, when Fidelity began to suffer operating losses for the first time in its history. These operating losses resulted from two factors: the dramatic increase in interest rates which began in October 1979, and a decision by the Federal Home Loan Bank of San Francisco in December 1979 to deny Fidelity the right to participate in regular advance programs and confine it to a punitive advance category called Other Special Credit. A-34. Because Fidelity was placed in this punitive credit category, the Bank charged Fidelity interest rate penalties and higher interest on mortgages discounted with the Federal Home Loan Bank than other associations in the Federal Home Loan Bank's district. These excess interest rates and interest rate penalties totaled $62.4 million. A-36.

After an extended effort to obtain an administrative remedy from the Bank's punitive credit program, Fidelity was finally notified on April 5, 1982 that the Federal Home Loan Bank was denying any relief. A-35. On April 9, 1982, Fidelity filed suit against the Federal Home Loan Bank seeking recovery of the penalties and excess interest it had been charged by the Federal Home Loan Bank, along with damages. A-36.

On that same day, the Federal Home Loan Bank decided to discontinue further advances to Fidelity. A-36. The President of the Federal Home Loan Bank and the Director of FSLIC then demanded the State Savings and Loan Commissioner seize Fidelity, claiming that in the absence of Federal Home Loan Bank advances, Fidelity would be faced with a liquidity crisis.[2] A-36; R.T. 88-89.

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[2]Fidelity had sufficient collateral to provide over $120 million in additional liquidity at the time of the takeover, a fact the Federal Home Loan Bank and FSLIC did not disclose to the Commissioner. C.T. 60 at 8.

The State Commissioner opposed these demands because Fidelity was solvent and had net worth of approximately $20 million. The State Commissioner strenuously argued for other alternatives to seizure, so that the shareholder's equity would be preserved. But the Director of FSLIC "indicated that FSLIC was not concerned with protecting shareholders' interests," and only one alternative was acceptable to FSLIC: immediate seizure of the business. A-36. He repeatedly told the State Commissioner: "You have to close it and appoint us receiver so as to wipe out the stockholders." R.T. 64, 66, 68. Faced with defendants' repeated assertions Fidelity would not have adequate liquidity in the absence of Federal Home Loan Bank advances, the State Commissioner reluctantly concluded she had "no choice but to do what the Federal regulators wanted the State to do: to take possession of the institution and to appoint FSLIC the receiver."[3] A-36.

The Commissioner agreed to take possession of Fidelity's business with the understanding that FSLIC would be appointed *state receiver.* A-37. The Commissioner made it clear to defendants that Fidelity's doors were not to be closed, and no interruption of business services was to be permitted. A-37; R.T. at 21-22, 24-25. The Commissioner was assured by FSLIC that no liquidation would occur, and that FSLIC would do no more than hold Fidelity, manage it and ultimately seek a merger partner for it. Although the Commissioner issued an order of liquidation, she did so only to facilitate "matching of technical legal language" between the state and federal laws, so as to satisfy statutory preconditions to appointment of FSLIC as state receiver. A-37; R.T. 26. She understood FSLIC would act as state receiver for Fidelity subject to her overall control. R.T. 26, 79, 81.

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[3]It is for these reasons the district court concluded the State Commissioner was an "unwilling coconspirator" in the federal defendants' efforts to seize Fidelity. A-47.

At the end of the business day on April 13, 1982, the State took possession of Fidelity and appointed FSLIC *state* receiver under the provisions of state law. Calif. Fin. Code §§ 9101, 9102; A-38. Contrary to assurances given to the State Commissioner, immediately after it was appointed state receiver "FSLIC terminated the State receivership by declaring itself to be the sole *federal* receiver." A-38. At the same time, FSLIC entered into an "acquisition agreement" selling Fidelity's assets to Fidelity Federal Savings of San Francisco, a federal mutual savings and loan association created by FSLIC to take over Fidelity's business.[4] A-38. This acquisition agreement severed Fidelity's shareholders from their equity interest in the association. Fidelity opened for business as usual the next day, April 14, 1982, as Fidelity Federal Savings of San Francisco.

Fidelity was never closed to its customers and no depositor of Fidelity was ever denied a withdrawal. A-42, 46-48.

B. Proceedings Before the District Court

On April 19, 1982, Fidelity filed this action, pursuant to 12 U.S.C. § 1729(c)(3)(A) and 12 U.S.C. § 1464(d)(6)(A), seeking removal of FSLIC as receiver on the ground that none of the three statutory preconditions for a federal receivership existed. 12 U.S.C. § 1729(c)(2). The district court bifurcated trial to determine first whether the preconditions for the receivership set forth in 12 U.S.C. § 1729 (c)(2)(A) (the association had been in state receivership for 15 days or closed under state law) and 12 U.S.C. § 1729(c)(2)(C) (inability of a depositor to make a withdrawal) existed. A-38. In its opinion and order on removal of receiver, the district court held that the Federal Home

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[4]The only assets not transferred to Fidelity Federal were the lawsuit filed by Fidelity against the Federal Home Loan Bank of San Francisco to recover $62.4 million in penalty interest Fidelity paid to the Bank and contingent claims against directors, officers and majority shareholders. These assets were retained by FSLIC. C.T. 113, Ex. A.

Loan Bank Board "acted in violation of both the clear command of the applicable federal statute and the underlying policy which limited federal intrusion in the supervision of state associations." A-34.

While FSLIC had attempted to satisfy § 1729(c)(2)(A) by momentarily declaring Fidelity "closed" at the end of the business day on April 13, 1982, the district court found that the Federal Home Loan Bank Board had "played an active role in the artificial creation of a closing under state law," in an attempt to manufacture the conditions that would permit federal preemption under the statute. A-46. With respect to § 1729(c)(2)(C), the defendants conceded there were no depositors who were unable to withdraw funds, and therefore the court found that the precondition regarding inability to withdraw funds also was not satisfied. A-47-48. Since the federal takeover violated the statute, pursuant to 12 U.S.C. § 1464(d)(6)(A) the court issued an order removing FSLIC as federal receiver and returning to Fidelity the assets remaining in the possession of FSLIC. A-54.

Because the case involves "extremely important questions" of statutory construction that have a vital impact on administration of the dual state-federal system for regulating state-chartered associations, the district court certified its orders for appeal pursuant to 28 U.S.C. § 1292(b). A-26-27, 34. The court of appeal set the matter for expedited briefing and argument. In its opinion of September 2, 1982, the court held that actual compliance with the statute was unnecessary and reversed.

C. Statutory Scheme and Decision of the Court of Appeals

The National Housing Act provides two avenues for appointment of FSLIC as receiver of a state-chartered savings and loan association insured by FSLIC. First, under 12 U.S.C. § 1729(c)(1), FSLIC may be appointed *state* receiver of an insured state association "in default" if appointment is tendered by the state regulatory

authority. 12 U.S.C. § 1729(c)(1). The term "default" is defined as a determination by a court or other public authority "pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation." 12 U.S.C. § 1724(d).

A separate provision of the Act, 12 U.S.C. § 1729(c)(2), gives the Federal Home Loan Bank Board power to preempt the state regulatory authority and appoint FSLIC *federal* receiver of a state-chartered association, provided each of three statutory preconditions to federal preemption exists:

> A conservator, receiver or other legal custodian has been appointed for the association by the state regulatory authority and the appointment has been outstanding for at least 15 days, or the association has been closed by or under state law [§ 1729(c)(2)(A)]; and
>
> One or more holders of withdrawable accounts are unable to obtain a withdrawal [§ 1729(c)(2)(C)]; and
>
> One or more of the grounds specified in 12 U.S.C. § 1464(d)(6)(A) for placing a federal savings and loan association in receivership exists [§ 1729(c)(2)(B)].[5]

Three crucial differences separate a § 1729(c)(1) state receivership and a § 1729(c)(2) federal receivership:

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[5]Because the district court ruled at the conclusion of the first part of the bifurcated trial that neither § 1729(c)(2)(A) nor (2)(C) had been met, it did not consider whether § 1729(c)(2)(B) was satisfied. The grounds for a federal receivership under § 1464(d)(6)(A) are insolvency; substantial dissipation of assets due to violations of law or unsafe and unsound practices; unsafe or unsound condition to transact business; willful violation of a final cease and desist order; and concealment of or refusal to submit the association's records, assets and affairs for inspection.

First, under a § 1729(c)(1) state receivership, FSLIC acts as state agent subject to applicable state laws, oversight and control by the state agency that appointed it, and supervision of the state courts. A § 1729(c)(2) federal receivership supplants and extinguishes all state authority over the receivership and the seized state association. *Second*, jurisdiction for review of a § 1729(c)(1) state receivership rests in state court. The federal courts have exclusive jurisdiction for judicial review of a § 1729(c)(2) federal receivership. *Third*, the legality of a § 1729(c)(1) state receivership is determined under state law. Federal law governs the legality of a § 1729 (c)(2) receivership.

Despite the distinction Congress created between a state and federal receivership in enacting sections 1729(c)(1) and (c)(2), the court of appeals held that two of the three preconditions to federal preemption, § 1729 (c)(2)(A) and § 1729(c)(2)(C), are satisfied any time a § 1729(c)(1) state receivership exists. With respect to the first precondition, the court found "the issuance of a liquidation order and the appointment of FSLIC as state receiver of Fidelity by the Commissioner achieved a closure within the meaning of Section 1729(c)(2)(A)." A-21. As for the second precondition, subsection 1729(c)(2)(C), the court said: "we hold that when the Commissioner promulgated her liquidation order and her appointment of the FSLIC as state receiver, and the Board accepted the appointment, the requirement of inability to withdraw was met." A-24.

The court thus adopted defendants' position that "the closing and withdrawal requirements of § 1729(c)(2)(A) and (C) are satisfied whenever the FSLIC is appointed as state receiver for the purpose of liquidation." A-9. Since under § 1729(c)(1) FSLIC may only be appointed state receiver "for purposes of liquidation" [*see* 12 U.S.C.

§§ 1724(d), 1729(c)(1)], the holding in this case is that §§ 1729(c)(2)(A) and (C) are automatically satisfied any time state authorities appoint FSLIC state receiver under 1729(c)(1). Such a construction of the statute is not only insupportable[6], it raises fundamental issues that must be resolved by this Court regarding the authority of these federal regulatory authorities over state financial institutions.

REASONS FOR GRANTING WRIT OF CERTIORARI

This case raises important issues of first impression under Title IV of the National Housing Act.[7] The ruling below is the first appellate court decision to interpret and apply the provisions of the Act defining federal authority to preempt state jurisdiction and impose a receivership over a state-chartered savings and loan association. The Federal Home Loan Bank Board's current policy is to oust state authorities and impose a federal receivership under § 1729(c)(2) whenever FSLIC is appointed state receiver under § 1729(c)(1). The decision below gives judicial approval to this policy, even though the statutory language and legislative history is to the contrary.

The decision below drastically tips the balance between state and federal regulatory authorities, to the detriment of the thousands of state-chartered financial institutions and the state agencies with responsibility for overseeing them.[8] The language, structure and history of the Act reflect an overriding Congressional concern for the preservation of state authority over state-chartered savings and loan associations. Federal authorities were to be per-

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[6] *See* pp. 14-17, *infra*.

[7] 12 U.S.C. §§ 1724 et seq.

[8] There are over 2,400 state-chartered savings and loan associations which are insured by FSLIC, and thus subject to overlapping state and federal supervision. Savings and loan associations are failing at the highest rate since the 1930s, and the Federal Home

mitted to preempt a state receivership and divest the state administrative and judicial system of jurisdiction only in the most urgent situations, which Congress precisely defined. To preclude unnecessary or premature federal preemption, Congress wrote into the statute three separate, objective preconditions to a federal receivership. A-46. Yet the decision below, by holding two of the three limitations to federal preemption may be ignored whenever FSLIC is appointed state receiver, admittedly makes federal preemption "easy". A-22. It gives the federal regulators authority to make routine use of a power intended only for the most extraordinary situations.

As the district court found, the interpretation given the statute by defendants (and now the court of appeals) "emasculate[s] the independent and well-thought out prerequisites to federal intervention in the affairs of state savings and loan associations." A-44. The legislative history establishes that the statutory provisions the court of appeals nullified were adopted precisely in order to preserve the distinction between state and federal associations and the balance between state and federal regulatory authority. The decision significantly impairs the ability of the states to control and regulate state-chartered savings and loan associations, erases the unique state law procedural and substantive protections state associations enjoy by virtue of their state charter, and undermines the integrity of the dual state-federal system Congress established for regulating state-chartered savings and loan associa-

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Loan Bank Board has stated that scores of Savings and loan associations are experiencing financial difficulties that will result in receiverships. For example, in their application to the Ninth Circuit for an expedited appeal, the Federal Home Loan Bank Board stated: "Based on FSLIC projections, it is estimated that several state-chartered FSLIC-insured associations in California are in danger of failure in the next 12 months. These institutions currently have assets aggregating in excess of $4.5 billion." Declaration of H. Simon in Support of Application for Expedited Appeal, page 7.

tions. The critical effect of the decision below on the administration of the National Housing Act, the rights of state associations, and the relationship of federal and state regulatory authorities makes hearing of this case by this Court imperative.

This case also raises substantial questions relating to the authority of federal regulators to seize a state-chartered financial institution, deprive the association of its right to due process as established by state law, and dispose of its property prior to any form of hearing. A state association has an entitlement to the substantive and procedural protections stemming from state law which cannot arbitrarily be denied, as in this case. Further, although this Court has held that a financial institution may be summarily seized by federal regulators where prompt governmental action is needed to conserve a failing institution's assets, *Fahey v. Malonee*, 332 U.S. 245 (1947),[9] it has never approved the practice, currently followed by defendants, of selling a seized association to another institution immediately after seizure without an opportunity for a hearing. Although the sale of an association's assets entails an entirely different balance of governmental and private interests than does the initial takeover, lower courts have summarily dismissed due process challenges to such *ex parte* sales on the erroneous assumption that *Fahey* permits whatever disposition the regulators desire.[10] The court of appeals' similar assumption that such a procedure is permissible is in direct conflict with recent decisions of this Court in other areas requiring a hearing prior to such a deprivation of property, in the absence of an overwhelming governmental interest.

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[9]*See also Title Guaranty & Surety Co. v. Idaho*, 240 U.S. 136, 141 (1916).

[10]*See, e.g., Federal Deposit Insurance Corp. v. American Bank Trust Shares, Inc.*, 639 F.2d 951 (4th Cir. 1980) (*ex parte* sale of seized state bank's assets does not offend due process).

A. The Decision Below Involves Important Issues of Statutory Construction Central to the Administration of the National Housing Act and Is In Direct Conflict with the Express Provisions of the Act

The lower court's conclusion that the preconditions to federal preemption set forth in § 1729(c)(2) may be ignored when FSLIC has been appointed state receiver under § 1729(c)(1) is in direct conflict with the unequivocal language of the statute and clear intent of Congress.[11] But, because the defendants insisted they need authority to "federalize" § 1729(c)(1) state receiverships, the court sanctioned administrative nullification of key provisions of the Act. Guidance by this Court is particularly appropriate since by deferring to an administrative construction of the statute directly contrary to the intent of Congress, the court of appeals abdicated its responsibility to enforce Congressional mandates when federal regulators refuse to comply with them.[12]

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[11]In fact, the court of appeals conceded it was "interpreting section 1729(c)(2) teleologically, not literally" A-22. It rejected Fidelity's contention the preconditions to federal preemption in § 1729(c)(2)(A) and (C) must actually exist before a federal receivership may be imposed, even though such an interpretation would "enhance the analytic meshing of subsection 1729(c)(1) and (c)(2)," (A-22), on the theory that compliance with the statute would "require enactment of a farce," and insistence upon "ceremonies that are meaningless." A-21. As is explained at p. 16 *infra*, § 1729(c)(2) does not enumerate steps the state or federal authorities may take to create the statutory conditions for a federal receivership; instead, the statute sets forth objective conditions which must exist prior to federal preemption.

[12]The decision is based largely on the court's conclusion that it should give substantial deference to "a contemporaneous interpretation of the statute by the agency responsible for its administration, as we have before us here. [citations omitted] That interpretation by the Bank Board is that the closing and withdrawal requirements of § 1729(c)(2)(A) and (C) are satisfied whenever the FSLIC is appointed as state receiver for the purpose of liquidation." A-9.

Nothing in the National Housing Act supports the conclusion that appointment of FSLIC as state receiver under § 1729(c)(1) constitutes automatic satisfaction of §§ 1729 (c)(2)(A) and (C). The statute nowhere suggests the preconditions to federal preemption may be ignored simply because FSLIC rather than some other entity is appointed state receiver for the association.[13] Indeed, instead of providing that the statutory preconditions are inapplicable when FSLIC is state receiver, the Act explicitly recognizes that the preconditions to federal preemption apply whether or not FSLIC (referred to in the Act as "the Corporation") has been appointed as the state receiver. Subsection 1729 (c)(2)(A)(i) provides that the first precondition to federal preemption exists if "a conservator, receiver, or other legal custodian (*whether or not the corporation*) has been appointed for [a state association] other than by the Board (whether or not such institution is in default) and that the appointment . . . has been outstanding for a period of at least fifteen consecutive days." 12 U.S.C. § 1729 (c)(2)(A)(i) (emphasis added). Thus, instead of providing that an existing § 1729(c)(1) state receivership may immediately and automatically be converted to a federal receivership, the statute states the opposite: The Federal Home Loan Bank Board must wait at least 15 days before declaring a federal receivership if there is a preexisting state receivership, "whether or not the corporation" is the state receiver.[14]

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[13]If Congress had meant for the preconditions to a federal receivership contained in §§ 1729(c)(2)(A) and (C) to be disregarded when FSLIC had been appointed state receiver under § 1729(c)(1), § 1729(c)(2) would state FSLIC may be appointed federal receiver whenever it has been appointed state receiver under § 1729(c)(1), and one or more of the grounds specified in § 1464(d)(6) exists.

[14]If appointment of FSLIC as state receiver under § 1729(c)(1) was intended to obviate the preconditions to federal preemption contained in § 1729(c)(2)(A), the phrase "whether or not the Corporation" in § 1729(c)(2)(A)(i) would be meaningless.

The decision below circumvents statutory requirements with the fiction that Fidelity was "closed," i.e., that § 1729 (c)(2)(A)(ii) was met because the appointment of FSLIC as state receiver was accompanied by an order of liquidation. The court of appeals failed to recognize that appointment of FSLIC as state receiver under § 1729(c)(1) may in any event only occur when the state has issued a liquidation order: Section 1729(c)(1) states FSLIC may accept appointment as state receiver only if an insured state-chartered association is in "default"; the term "default" is defined in § 1724(d) to mean appointment of a receiver "for the purpose of liquidation." Accordingly, FSLIC may be appointed state receiver under § 1729(c)(1) *only* when the state authority has entered an order of liquidation. Thus, the holding below not only disregards § 1729(c)(2)(A)(i), it vitiates § 1729(c)(1) as an independent statutory provision.

The statute also conflicts with the court's holding that the precondition in § 1729(c)(2)(C) was met by the state's prior appointment of FSLIC as state receiver. The court's conclusion that one or more depositors were unable to withdraw funds is based on an attenuated fiction: that creation of a state receivership means Fidelity was constructively closed, and the inability of depositors to make withdrawals "follows logically from the conclusion Fidelity was closed." A-24. Nothing in the statute indicates that the precondition of § 1729(c)(2)(C) automatically exists whenever the precondition of § 1729(c)(2)(A) is found to exist. Instead, it is a fully independent limit on federal preemption designed to be a further check on federal powers.[15]

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[15]The legislative history shows Congress intended § 1729(c)(2)(C) to be a separate, independent precondition that must exist before the Bank Board obtains the power to preempt state authorities and appoint FSLIC federal receiver. *See, e.g.*, S. Rep. No. 1263, 90th Cong., 2d Sess. (1968), reprinted in 1968 *U.S. Code Cong. & Ad. News*, 2530, 2541; 114 *Cong. Rec.* 18298-99 (1968) (remarks of Rep. Patman). Absent clear indication of legislative

The preconditions to a § 1729(c)(2) receivership set forth in the statute do not, as the appellate court seemed to believe, require "enactment of a farce" or compliance with "ceremonial" formalities by defendants in order to qualify a state association for a federal receivership. A-21. The statute does not contemplate that defendants would fabricate the conditions for federal intervention by declaring an association constructively closed and then find that theoretically depositors cannot withdraw funds.[16] Rather, the statute sets forth objective conditions to which defendants may respond. The purpose of these conditions is to limit federal jurisdiction to preempt state administrative and judicial control to those urgent situations where it is essential that federal authorities assume control in order to protect federal interests.

In sum, the language of the statute is clear. The court should not have deferred to the interpretation given the statute by defendants, since that interpretation is patently erroneous. There is, however, an even more persuasive reason the court should not have adopted defendants' interpretation: When § 1729(c)(2) was passed, Congress

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intent to the contrary, the statutory language controls its construction. *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981). *See United States R.R. Retirement Bd. v. Fitz*, 449 U.S. 166 (1980).

[16]In fact, there is no need for defendants to manufacture the conditions for a § 1729(c)(2) federal receivership because as state receiver under § 1729(c)(1), FSLIC has ample powers under state and federal law to preserve assets and protect depositors. *See* note 19 *infra*. To remedy what defendants claimed was a precarious financial condition, FSLIC replaced Fidelity's four senior officers, provided "Income Capital Certificates" to increase paper net worth, and guaranteed advances to be made by the Federal Home Loan Bank of San Francisco. Defendants then announced to the public less than 24 hours after the seizure that Fidelity was "safe and sound." FSLIC had full authority to take these actions as state receiver and in the absence of any sale of the association. 12 U.S.C. § 1729(b), (c)(1), (d); 12 C.F.R. § 569.4; Cal. Fin. Code § 9104.

considered and rejected a version of the statute which would have given defendants the very authority they now claim.[17] As introduced, at the request of the Federal Home Loan Bank Board, the statute would have authorized the Bank Board to appoint FSLIC as federal receiver for an insured state association if (1) a conservator, receiver or other legal custodian had been appointed or the association had been closed under state law; and (2) the appointment was "advisable in the public interest." S. 3436, 90th Cong., 2d Sess. (1968), reprinted in *Savings and Loan Receiverships: Hearings Before the Senate Comm. on Banking and Currency,* 90th Cong., 2d Sess. 2-3 (1968) (*"Senate Hearing"*). This bill was criticized for the "arbitrary power" it gave the Bank Board and the "pliable and illusory standard of public interest" in the bill, and for its intrusiveness on state authority over state savings and loan associations. *Senate Hearing* at 19, 37-38.

As a result, the Senate Banking Committee rewrote the bill to increase the number of conditions that had to be satisfied before the Federal Home Loan Bank Board could appoint FSLIC federal receiver, and to make those conditions more objective. The committee modified the first requirement to provide that a state-appointed receiver, *whether or not* FSLIC, and *whether or not* appointed for the purpose of liquidation, be outstanding at least 15 consecutive days, or that the institution be closed under state law. Second, the committee replaced the requirement that the appointment be "advisable in the public interest" with the requirement that the same grounds exist for appointing FSLIC receiver for a state association as must exist to appoint FSLIC receiver for a federal association under 12 U.S.C. § 1464(d)(6)(A). Finally, the committee added

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[17] *See, e.g., Maurer v. Hamilton,* 309 U.S. 598, 614 (1940) (hesitancy of Congress to interfere with state regulation and its failure to adopt more far-reaching proposals is persuasive against such a construction).

the requirement that one or more holders of withdrawable accounts be unable to obtain a withdrawal of their account. S. Rep. No. 1263, 90th Cong., 2d Sess. (1968), reprinted in 1968 *U.S. Code Cong. & Ad. News,* 2530, 2541 ("S. Rep."). Congress enacted the committee version without change.

The Federal Home Loan Bank Board's reading of § 1729(c)(2), adopted by the court, ignores the changes to the legislation made by the committee amendments. If appointment of FSLIC as state receiver under § 1729(c)(1) constitutes constructive satisfaction of the preconditions to a federal receivership contained in §§ 1729(c)(2)(A) and (C), nothing separates a (c)(1) state receivership from a (c)(2) federal receivership except the Bank Board's view that a federal receivership is advisable. This is exactly the illusory standard Congress sought to avoid.

Nonetheless, the appellate court was persuaded to ignore the statutory language and legislative history by defendants' assertion that financial disruption can only be avoided if federal regulators are given unfettered power to preempt a preexisting state receivership.[18] Such an assertion is, in fact, in error. As state receiver, FSLIC could have fully protected depositors and the public without being appointed federal receiver and without creating a federal mutual to take over Fidelity's business.[19] *See* 12 U.S.C.

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[18]The court made it clear it thought it necessary to ignore the statutory preconditions in order to avoid an interpretation which "imposes upon the relevant financial community an unnecessary risk of depositor panic." A-21.

[19]12 U.S.C. § 1729(c)(3)(A) provides that when FSLIC is appointed federal receiver of a state association, 12 U.S.C. § 1434(d) is applicable as though FSLIC had been appointed receiver for a federal association. 12 U.S.C. § 1729(c)(1) states that when FSLIC is appointed state receiver of a state association "it shall have the same powers and duties with respect to the insured institution" as are conferred upon it by 12 U.S.C. § 1729(b) when it becomes receiver of a federal asociation. *See* note 16, *supra.*

§ 1729(c)(1); 12 C.F.R. § 569a.4; Calif. Fin. Code § 9103. It was therefore unnecessary for the court below to nullify a major portion of the statutory scheme. But more to the point, defendants' argument that it is important for FSLIC to be federal receiver rather than state receiver is not a tenable ground for decision. Congress has already weighed the various interests involved, and struck a balance between competing policies, which is reflected in the statute. The court, for policy reasons posited by defendants, ignored that legislatively mandated balance and read important protections out of the statute. Accordingly, it is essential for this Court to hear these issues which are central to the proper administration of the National Housing Act and resolve whether Congress or the defendants has ultimate authority to determine the jurisdiction of the federal regulatory authorities over state financial institutions.

B. The Decision Contravenes the Principles of Comity and Federalism Embodied In the Statutory Scheme and Involves Questions of Exceptional Importance to the Dual State-Federal System for Regulating State-Chartered Financial Institutions

The construction given the statute by the court below is diametrically opposed to the fundamental principles of comity and federalism underlying the statutory scheme. The preconditions to federal preemption Congress wrote into the statute were prompted by its overriding concern to protect the integrity of the state savings and loan system and the rights state associations enjoy under state law. Because the decision permits federal authorities to preempt at will a FSLIC state receivership, it has a serious adverse effect on the jurisdiction of state supervisory authorities and courts over state-chartered financial institutions.

The National Housing Act is not an act in which the federal interest is so dominant and the scheme of federal

regulation so persuasive that enforcement of state laws on the same subject is precluded. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). To the contrary, the statute was designed to supplement state law and calls for state authority to be supplanted only where necessary to achieve the specific purposes for federal intervention underlying the legislation.[20]

To understand the competing state and federal interests at issue in this case, it is necessary to look at the statutory scheme as a whole. Section 1729(c)(1) was enacted to allow FSLIC to function as state receiver subject to overall state jurisdiction. Federal interests are served since, as receiver, FSLIC can ensure that the federal insurance fund is protected. However, state regulatory authorities retain overall control over the receivership and the association retains its right to judicial review and supervision of the receivership in state court under state law. Section 1729(c)(1) is an example of cooperative federalism, carefully crafted to respect fundamental principles of comity.

Section 1729(c)(2) was adopted in 1968[21] to give the Federal Home Loan Bank Board authority to preempt state regulatory authorities in limited situations where federal interests could only be protected through federal preemption. Congress enacted § 1729(c)(2) in response to the refusal of Illinois banking officials to cooperate with

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[20]*See generally,* Hart & Wechsler, *The Federal Courts and the Federal System,* 435 (1953): "Federal law is generally interstitial in nature. It rarely occupies a legal field completely. [Federal] legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." *See also* Hart, *The Relation Between State and Federal Law,* 54 Colum. L. Rev. 489 (1954).

[21]Bank Protection Act of 1968, Pub. L. 90-389, 82 Stat. 197.

federal authorities after the collapse of Marshall Savings and Loan Association in 1965, and the resulting lengthy delay in payment of insurance to depositors.[22] State officials had taken custody of the association and suspended all withdrawals for over three months. The association had "ceased doing business and savers were not permitted to withdraw their funds." *Senate Hearing* at 8. However, FSLIC could not make insurance payments to depositors because a receiver had not been appointed for the purpose of liquidation, the condition triggering insurance payments under 12 U.S.C. §§ 1724(d), 1728(b). In addition, because the State of Illinois did not appoint FSLIC receiver under § 1729(c)(1), FSLIC was unable to manage the association's assets, which were allowed to deteriorate, and recover a portion of the eventual federal insurance fund payout.

As a result of these problems, the Federal Home Loan Bank Board sought "reserve power" from Congress to preempt state jurisdiction and impose a federal receivership on state associations in two specific situations: (1) where public confidence in the industry is at stake because an association is closed and deposits frozen, making FSLIC insurance payments essential, and (2) where the state authorities have mismanaged a state receivership and allowed the association's assets to deteriorate, thus preventing FSLIC from recouping insurance payments ultimately made on the association's behalf. *See Senate Hearing* at 7-12.

Although Congress agreed federal authorities needed such additional powers, it was very concerned about the effect the proposed expansion of federal authority over state associations would have on the vitality of the state savings and loan system. *See* 114 *Cong. Rec.* 11725 (1968)

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[22] *See, e.g., Savings and Loan Receiverships: Hearing Before the Senate Committee on Banking and Currency*, 90th Cong., 2d Sess. 8 (1968) (*"Senate Hearing"*); 114 *Cong. Rec.* 18298-99 (1968).

(Remarks of Sen. Bennett). For this reason, Congress built the three preconditions into the statute to preclude unnecessary or premature federal intervention into the affairs of state-chartered savings and loan associations and unnecessary or premature preemption of state administrative and judicial authority.

These preconditions were tailored to permit federal intervention only where absolutely necessary. Subsection 12 U.S.C. § 1729(c)(2)(A)(ii) was designed to permit the federal authorities to react to a situation in which state regulators closed the association by terminating its operations, as in the Marshall case. Nevertheless, as a further check on federal authority, Congress additionally required that savers be unable to withdraw deposits. 12 U.S.C. § 1729 (c)(2)(C). In this sort of urgent situation Congress felt the federal government should be able to oust the control of state authorities over a state-chartered savings and loan association. *See* 114 *Cong. Rec.* 18298 (1968) (Remarks of Rep. Patman).

Subsection 1729(c)(2)(A)(i) was designed to address the problem of mismanaged state receiverships. However, Congress was particularly reluctant to permit federal preemption where a state receiver had previously been appointed. It therefore not only required a finding the state receivership had been in effect for at least 15 days, it also required a finding under § 1729(c)(2)(C)—that depositors be unable to withdraw funds—as a precondition to federal preemption in this situation as well.[23] The

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[23]Congress made the inability of depositors to withdraw funds a statutory precondition to limit preemption to extremely serious situations in which deposits were frozen, and public confidence in the industry was at stake. For this reason, where there is a state receivership the Federal Home Loan Bank Board must stay its hand unless it also appears the state receiver has been unable to ensure the ability of depositors to withdraw funds. "The aim of the [1968] legislation is to enable the FSLIC to effect an orderly dis-

reason for the multiple preconditions is manifest: to limit occasions for federal preemption to the most urgent situations. *See* S. Rep. at 2541.

The court below conceded that the preconditions in § 1729(c)(2) were meant to preclude premature or unnecessary federal intervention:

> Congress recognized a legitimate and competing state interest in regulating state-chartered associations. A balance was struck in dividing the responsibility for the state and federal governments. *See* S. Rep. at 2538. The requirements of a closure under state law and a determination of depositor inability to withdraw funds were meant to safeguard the state receivership from premature federal intervention. A-19-20.

However, applying a "teleological" rather than literal interpretation to the statute, A-22, the court justified eliminating the preconditions to federal preemption in this case: since the state had appointed FSLIC as state receiver under § 1729(c)(1), according to the court it had "invited federal intervention," and therefore "[n]o need to protect the state from unwanted federal meddling exists." A-21.

This rationale is wrong is several respects. First, as is explained at pages 14-15, *supra*, the statute specifically states that the preconditions to federal preemption apply whether or not FSLIC had been appointed state receiver under § 1729(c)(1). The court's "teleological interpretation" is directly contrary to the unambiguous language of the statute itself.

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position of the assets of insured associations whose depositors have been reimbursed by FSLIC insurance payments." S. Rep. at 2531. In this case, FSLIC has paid no funds to any Fidelity depositor. A-49.

Further, it is illogical to conclude, as did the court, that by appointing FSLIC as state receiver, subject to state control and supervision, the state had "invited" federal authorities to preempt the state receivership and oust state authorities. The fact that state authorities might have "cooperated" with federal authorities to the extent of appointing FSLIC state receiver does not provide an excuse for federal preemption. To the contrary, it means there is no compelling need for federal authorities to oust state jurisdiction. Absent such a need, Congress, by requiring preconditions limiting federal preemption, sought to protect the state interest in preserving state jurisdiction and control over the receivership, including when FSLIC is acting as state receiver. This is the reason the Act creates a distinction between a § 1729(c)(1) state receivership, and a § 1729(c)(2) federal receivership. The decision of the court below obliterates this distinction.

Most important, the court's rationale is based on the incorrect premise there are no state interests that merit protection when FSLIC is appointed state receiver. To the contrary, the state has significant interest in maintaining the receivership as a state rather than federal receivership. As state receiver under § 1729(c)(1), FSLIC was "subject to the regulation of the public authority that appointed it." A-10. *See Hancock Financial Corp. v. FSLIC*, 492 F.2d 1325, 1327 (9th Cir. 1974). It was the State Commissioner, not FSLIC, who would have had ultimate authority to liquidate or merge Fidelity into another association. Calif. Fin. Code §§ 9056, 9058, 9204. The federalization of the receivership "abrogated the Commissioner's ability to control or terminate the receivership." A-7-8.

The Commissioner did not invite the termination of her control over the receivership, as the court below erroneously concluded. Rather, the Commissioner viewed it as imperative to the protection of vital state policies and concerns that she oversee the course of the receivership

and, if necessary, check the actions taken by FSLIC as state receiver. The Commissioner wished to safeguard the interests of Fidelity's 5,000 shareholders, and strenuously objected to FSLIC's practice of "wiping out" shareholder interests. She criticized the federal takeover as the "nationalization" of a state-chartered association. The Commissioner also vehemently opposed the solution FSLIC as federal receiver devised for Fidelity, ultimate sale of Fidelity to Citicorp, a national bank. FSLIC could not have ignored state policies on these matters if it had remained state receiver subject to control of the State Commissioner.

The federal receivership also ousted the state courts from their supervisory role over the state receivership and terminated Fidelity's ability to obtain judicial review of the seizure in state courts, under the provisions of state law. *See* Calif. Fin. Code § 9003. Under California law, as in other states, a seized association's rights are by no means trivial. After the State Commissioner takes possession of an association under Financial Code § 9001, Financial Code § 9003 gives the association 10 days to seek judicial review of the legality of the seizure. Calif. Fin. Code §§ 9001, 9003. The substantive grounds for judicial review under § 9003 are different than under federal law. *Compare* Calif. Fin. Code §§ 9001, 9003 *with* 12 U.S.C. § 1464(d)(6)(A). In addition, state law provides that in a § 9003 action, the court "may upon the merits dismiss such action, or enjoin the Commissioner from further proceedings and direct him to surrender the business, property, and assets to the association." Calif. Fin. Code § 9003. Under this statute, "the right of the Commissioner to liquidate the association's assets is delayed until there has been a determination of the issues concerning solvency or compliance with statutory requirements." *Trede v. Superior Court,* 21 Cal. 2d 630, 634, 134 P.2d 745 (1943). *See Evans v. Superior Court,* 20 Cal. 2d 186, 189, 124 P.2d 820 (1942), *cert. denied* 320 U.S. 739 (1943). *See also State Savings & Commercial Bank v. Anderson,* 165 Cal. 437,

447-48, 132 P. 755 (1913), *aff'd* 238 U.S. 611 (1914). Under state law, when the State Commissioner takes possession the receiver she appoints (FSLIC in this case) cannot begin liquidation, dispose of the association's assets, or take any other action that would impair the court's jurisdiction to return the business to the association if it prevails in its action challenging the seizure. *See* Calif. Fin. Code §§ 9003, 9011. *See also Pacific States Savings and Loan Co. v. Hise,* 25 Cal. 2d 822, 830, 835, 155 P.2d 809 (1945); *North American Building & Loan Ass'n v. Richardson,* 6 Cal. 2d 90, 101-02, 56 P. 2d 1221 (1936). As federal receiver, FSLIC disregarded these state given rights.

Underlying this issue is the important concept of state-federal comity. Preemption of state law by a federal statute is disfavored. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311 (1981); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The courts apply a strong presumption that Congress did not intend to displace state law. *Maryland v. Louisiana,* 451 U.S. 725 (1981); *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 142 (1963). Congressional intention to displace local law is not to be inferred "unless clearly indicated by those considerations which are persuasive of the statutory purpose." *Maurer v. Hamilton,* 309 U.S. 598, 614 (1940).

Under Title IV of the National Housing Act, the Congressional desire to respect the state regulatory scheme, and supplant it only in very limited situations, is clear. Federal preemption was contemplated only in urgent situations where federal interests are paramount. In the interests of comity and federalism, the statute requires the federal authorities to refrain from preempting state jurisdiction over the receivership, and defer to the jurisdiction of state regulatory authorities and state courts. Because the decision below sanctions substantial federal intrusion into a sphere Congress reserved to the states, and involves

difficult and important issues of first impression in a sensitive area of state-federal relations, the decision should be reviewed by this Court.

C. This Case Raises Important Issues Regarding the Constraints Imposed by the Due Process Clause on the Authority of Federal Regulators to Eliminate Rights Established by State Law and to Dispose of a State Association's Assets Without a Hearing

Defendants' preemption of the state receivership and imposition of a federal receivership eliminated Fidelity's right to a hearing in state court, under state law, on the legality of the takeover. It also circumvented the mandatory state law stay prohibiting disposal of Fidelity's assets pending judicial review and allowed defendants to sell Fidelity's assets immediately after the takeover. This is defendants' policy and practice with respect to state receiverships, and is in keeping with their view that the only remedy for an illegal federal receivership is removal of the receiver, not the return of the association to its owners provided for under state law. As the district court characterized it, defendants construe federal law to permit them "to take over a state association in violation of statute, yet successfully prevent reacquisition by immediately transferring the assets to a new association." A-52. The elimination of state law rights and the sale without a prior hearing raise important due process issues that must be resolved by this Court.

The substantive and procedural rights state associations have under state law give rise to a property interest protected by the due process clause. *See Logan v. Zimmerman Brush Co.*, 50 U.S.L.W. 4247, 4249 (Feb. 24, 1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The automatic stay of the power to liquidate and sell an association's assets pending judicial review under Financial Code § 9003 is an entitlement grounded in state law, with

the result that regulatory authorities may not dispose of a state association's property prior to a hearing on the legality of the seizure.

The lower court erroneously concluded that the denial of Fidelity's right to a hearing prior to the sale of its property did not offend the requirements of due process since the receivership had been "federalized." Such conclusion ignored Fidelity's property interest provided by state law which cannot be denied by the act of "federalizing" the receivership.

Moreover, separate from the interests created by state law, due process is offended by the sale of Fidelity's property without a prior hearing. The court reasoned that the immediate sale of Fidelity's property was sanctioned by this Court's prior decisions authorizing post-depreviation hearings in certain emergency situations. Yet the decision below goes far beyond the decisions of this Court permitting a post-deprivation hearing where a prior hearing would be inconsistent with a governmental interest of overriding significance.[24] *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981).

In particular, the lower court's reliance on *Fahey v. Mallonee*, 332 U.S. 245, 253-54 (1947) was misplaced. In *Fahey*, this Court approved summary seizure of a federal

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[24]In *Federal Deposit Insurance Corp. v. American Bank Trust Shares, Inc.*, 629 F.2d 951 (4th Cir. 1980), the Court of Appeals for the Fourth Circuit similarly held the *ex parte* sale of a seized state bank's assets did not violate due process, by failing to distinguish seizure from sale or consider whether the governmental interests justifying summary seizure also necessitated summary sale. In that case, however, state law did not require a stay on the receiver's powers to liquidate and sell the state bank's assets pending hearing. Instead, state law permitted FDIC to sell those assets upon the consent of the State Banking Commissioner and court order, which occurred. *But see United States Building & Loan Ass'n v. McClelland*, 6 F.Supp. 299, 302 (D. Colo. 1934).

savings and loan association by federal regulators where necessary to preserve its assets. Here, however, defendants did not limit their actions to the summary seizure sanctioned by *Fahey*. Immediately following its appointment as federal receiver, FSLIC sold the bulk of Fidelity's assets and liabilities to a newly created federal mutual savings and loan association, Fidelity Federal Savings & Loan Association of San Francisco.

In recent cases, this Court has repeatedly stated that in the absence of an overriding governmental interest, a hearing is required before final deprivation of property occurs. *Paratt v. Taylor*, 451 U.S. 527, 540-41 (1981); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 16 (1978); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). The compelling governmental interests that justified exception to the requirement of a hearing prior to the seizure did not exist with respect to the sale. Indeed, other than defendants' desire to sever Fidelity's 5,000 shareholders from their equity interest in the association, there was no reason for an immediate sale. Yet the sale irreparably damaged Fidelity's goodwill, its value as an ongoing business, and its ability to resume business in the event the seizure and federal receivership are found to be illegal. The protection of depositors and the public was ensured by the appointment of FSLIC as state receiver, and no governmental interest was served by the transfer of Fidelity's assets prior to an opportunity for a hearing. Because the decision below is in conflict with recent decisions of this Court on the right to a hearing prior to deprivation of a significant property interest, a writ of certiorari to review the decision should be granted.

CONCLUSION

The decision below conflicts with the language, structure and history of the federal statute. It eliminates important substantive and procedural protections state associations enjoy under state law, and seriously undermines the dual state-federal system for regulating state-chartered savings and loan associations. Because the decision involves important issues relating to administration of Title IV of the National Housing Act, the balance between state and federal jurisdiction underlying the statute, and the due process rights of state financial institutions, the petition for writ of certiorari should be granted.

January 31, 1983

Respectfully submitted,

BARRY D. HOVIS
THOMAS G. REDDY
M. JANICE SMITH

STEPHEN L. KOSTKA
(COUNSEL OF RECORD)
PALMER BROWN MADDEN
LINDA AGERTER
Attorneys for Petitioner

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 82-4337
No. 82-4354

Fidelity Savings and Loan Association
Plaintiff-Appellee/Cross-Appellant,

vs.

Federal Home Loan Bank Board, et al.,
Defendant-Appellants/Cross-Appellees.

ORDER

[Filed Nov. 8, 1982]

Before: CHOY, SNEED, and FARRIS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix B

Fidelity Savings and Loan Association,
Plaintiff-Appellee, Cross-Appellant,

v.

Federal Home Loan Bank Board,
Federal Savings and Loan Insurance Corporation, et al.,
Defendants-Appellants, Cross-Appellees.
Nos. 82-4337, 82-4354.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 15, 1982.
Decided Sept. 2, 1982.

Appeal from the United States District Court for the Northern District of California.

Before CHOY, SNEED, and FARRIS, Circuit Judges.

SNEED, Circuit Judge:

This appeal has its origin in a dispute over the appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for a state-chartered association, Fidelity Savings and Loan Association (Fidelity). The Savings and Loan Commissioner for the State of California (Commissioner) seized Fidelity for the purpose of liquidation and appointed the FSLIC state receiver. Subsequently, the Federal Home Loan Bank Board (Bank Board) appointed the FSLIC federal receiver pursuant to 12 U.S.C. § 1729(c)(2). The Bank Board and the FSLIC, defendants below and appellants here, appeal from the district court's holding that they improperly seized Fidel-

ity and from that court's order for the return of certain assets held by the federal receiver to Fidelity. Jurisdiction in the district court was based on 12 U.S.C. § 1464(d)(6)(A). Our jurisdiction is based on 28 U.S.C. § 1292(b). Because we find that appellants satisfied the statutory requirements for the appointment of a federal receiver, 12 U.S.C. § 1729(c)(2)(A), (C), we reverse and remand for further proceedings.

I.

FACTS AND BACKGROUND

In 1979 Fidelity began experiencing severe financial difficulties as a result of its prior speculative loan commitment practices. Gambling that interest rates would fall, Fidelity had sold large amounts of short-term paper in order to obtain the funds to make long-term mortgage loans at then current market rates. When interest rates rose sharply, Fidelity suffered substantial operating losses and a decrease in net worth because the earnings on its low-yielding portfolio were less than the increasing cost of its short-term borrowing.

To meet its financial obligations, Fidelity borrowed in excess of $1.3 billion from the Federal Home Loan Bank of San Francisco by March 1982.[1] Fidelity's decline caused

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[1]These loans were made pursuant to a special credit program by which Fidelity was charged interest penalties and higher interest rates than other borrowing institutions. On April 9, 1982, after being notified that the Bank would not extend any more loans to it, Fidelity filed suit against the Federal Home Loan Bank of San Francisco in the Federal District Court for the Northern District of California, No. C82-1389 EFL, seeking recovery of the penalties and excess interest charges. As part of the remedy in the instant case, the district court ordered the lawsuit transferred from the federal receiver to Fidelity.

its depositors to withdraw nearly $70 million in deposits during the week of April 5, 1982. On April 9 the Bank advised the FSLIC that no further loans would be advanced to Fidelity unless the FSLIC guaranteed the loans. The FSLIC declined to advance the loan guarantees, and informed the California Savings and Loan Commissioner of its decision.

In light of Fidelity's precarious financial posture, the Commissioner decided to place the ailing institution in receivership and appoint the FSLIC as receiver for the state. At the close of business on April 13, 1982, state officials physically seized Fidelity by entering its offices in Oakland at approximately 4:40 p.m. and serving Fidelity with papers ordering its liquidation.[2] The Commissioner

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[2]The Commissioner's order taking possession of the property reads as follows (schedules omitted):

> I, LINDA TSAO YANG, Savings and Loan Commissioner of the State of California, pursuant to the authority vested in me under the Savings and Loan Association Law (Financial Code section 5000 et seq.), and in particular section 9001 of the California Financial Code, find that Fidelity Savings and Loan Association (sometimes hereafter referred to as "Association"), a corporation organized under the laws of the State of California and licensed by the Savings and Loan Commissioner, is:
>
> (1) In an unsafe condition;
>
> (2) Conducting its business in an unsafe manner;
>
> (3) Conducting its business in an injurious manner.
>
> Each of the above three findings render further conduct of Fidelity Savings and Loan Association's business to be hazardous to the public and its investors.
>
> My findings are based upon facts and information that have been brought to me as a result of an examination by the Department of Savings and Loan of the condition of Fidelity Savings and Loan Association, and of reports received by me, all of which facts and information confirm that Fidelity Savings and Loan Association is in an unsafe condition, is conducting

its business in an unsafe and injurious manner such as to render its further proceeding hazardous to the public and its investors. The facts and information underlying the above findings include, but are not limited to, the following:

(a) California Financial Code section 6900 and section 235.48 of the Savings and Loan Commissioner's Regulations (10 Cal. Admin. Code § 235.48) specify that the minimum statutory net worth of a California-licensed savings and loan association shall be three percent (3%) of the average of its total assets as of the end of its last five calendar years. The statutory net worth of Fidelity Savings and Loan Association at March 31, 1982 was 0.93 percent of the average total assets.

(b) The net worth of Fidelity Savings and Loan Association has eroded from $91,600,000.00 at January 1, 1981 to $19,600,000.00 at March 31, 1982. The net worth of the Association has continued to deteriorate and, if the average monthly operating loss of $5,000,000.00 continues or accelerates, the Association will exhaust its entire net worth on or before July, 1982.

(c) The Association has booked net operating losses of $1,400,000.00 for the year ended December 31, 1980, $57,000,000.00 for the year ended December 31, 1981 and $15,000,000.00 for the three months ended March 31, 1982.

(d) During the past year the Association has suffered significant outflows of savings deposits, and these outflows were funded by advances (borrowings) from the Federal Home Loan Bank of San Francisco (FHLB). The Association's need for cash funds has greatly increased due to the substantial daily withdrawals of savings deposits and of secured money funds. Exhibit A, attached hereto and incorporated herein, illustrates the savings outflow and the borrowing pattern of the Association. Exhibit B, attached hereto and incorporated herein, illustrates the steady outflow of funds for the week of April 5, 1982.

The Association has total borrowings of $1,409,116,000 from the FHLB as of April 12, 1982. The Association no longer has the ability to borrow from the FHLB and there are no other known sources for the borrowings required for the Association to operate.

There are certificates of deposit and secured money funds, which are obligations of the Association, due to mature on or before April 23, 1982 which total $73,205,000.00. Exhibit C,

attached hereto and incorporated herein, illustrates the potential cash needs of the Association through, and including, April 23, 1982. Based on the experience of recent weeks, nearly all of the cash from the certificates of deposit and secured money funds will be withdrawn from the Association as they mature.

(e) The Association has had negative operating spreads since November, 1980. A negative operating spread occurs when the average interest rate paid on savings and borrowings exceed the yield rate on loans and investments. The operating spread at February 28, 1982 is a negative 2.82.

(f) The Federal Savings and Loan Insurance Corporation ("FSLIC") the federal agency that insures accountholders of Fidelity Savings and Loan Association, has requested that the board of directors of Fidelity Savings and Loan Association grant to FSLIC authority to merge Fidelity Savings and Loan Association into another association to protect accountholders and limit the potential liability of FSLIC. That request was refused by the board of directors of Fidelity Savings and Loan Association.

THEREFORE, pursuant to each of said findings, and to the provisions of Section 9001 of the California Financial Code and the Savings and Loan Association Law, I, LINDA TSAO YANG, as Savings and Loan Commissioner of the State of California, hereby make demand to, and do, take possession of the property, business and assets of Fidelity Savings and Loan Association of California. You are hereby ordered to immediately deliver into my possession, and that of my authorized representatives, the property, business and assets of Fidelity Savings and Loan Association. Refusal to comply with this order is a misdemeanor as provided by Financial Code Section 9005.

The Commissioner's order of liquidation reads as follows:

I, LINDA TSAO YANG, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such capacity; having taken possession of the property, business and assets of Fidelity Savings and Loan Association; and based on all facts, information and reports available to me, including, but not limited to the facts and information listed as points a. through f. of my Order Demanding And Taking Possession Of Property, Business, And Assets of Fidelity Savings and Loan Association, which are incorporated herein by reference, do hereby find;

subsequently appointed the FSLIC as state receiver pursuant to California Financial Code §§ 9009, 9102 (West 1981).[3] At approximately 5:00 p.m., the Bank Board made an independent appointment of the FSLIC as federal receiver pursuant to 12 U.S.C. § 1729(v)(2). This appoint-

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(1) That it would be unsafe, unsound, and injurious to continue the business operations of Fidelity Savings and Loan Association; and

(2) That it is in the best interests of accountholders investors, and the public that Fidelity Savings and Loan Association be liquidated.

NOW, THEREFORE, pursuant to Article 1 (commencing with section 9000) and Article 3 (commencing with section 9100), Chapter 17, Division 2 of the California Financial Code, I, Linda Tsao Yang, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such official capacity, do hereby order that Fidelity Savings and Loan Association be liquidated.

[3]The Commissioner's appointment of FSLIC as receiver reads as follows:

I, LINDA TSAO YANG, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such official capacity, have taken possession of the property, business and assets of Fidelity Savings and Loan Association pursuant to my Order Demanding and Taking Possession of Property, Business and Assets of Fidelity Savings and Loan Association.

The accounts of Fidelity Savings and Loan Association are insured by the Federal Savings and Loan Insurance Corporation. Based on all the information and reports available to me, I believe it to be necessary and advisable to tender to the Federal Savings and Loan Insurance Corporation the appointment as receiver of Fidelity Savings and Loan Association.

NOW, THEREFORE, pursuant to Financial Code sections 9009 and 9102, I, Linda Tsao Yang, being the duly appointed and qualified Savings and Loan Commissioner of the State of California, and, acting in such official capacity, do hereby tender to the Federal Savings and Loan Insurance Corporation the appointment as receiver for liquidation of Fidelity Savings and Loan Association.

ment abrogated the Commissioner's ability to control or terminate the receivership. 12 U.S.C. § 1464(d)(6)(A); 12 C.F.R. § 569a.4 (1982). Fidelity's assets were then transferred to a newly created federal mutual association. Fidelity Federal Savings and Loan Association of San Francisco (Fidelity Federal).[4] The entire operation took less than thirty minutes. Fidelity's business was not significantly disrupted.

On April 19, 1982, Fidelity filed this action pursuant to 12 U.S.C. § 1464(d)(6)(A) for removal of the federal receiver and for such equitable relief as necessary to return Fidelity to the position it occupied prior to the appointment. Fidelity argued that the Bank Board had failed to satisfy the three preconditions for federal intervention under 12 U.S.C. § 1729(c)(2). The district court ordered the trial bifurcated. The first issue to be addressed was whether the Bank Board had satisfied the preconditions for the appointment of a federal receiver set forth in 12 U.S.C. § 1729(c)(2)(A) and (C). The second issue, not yet reached by the district court, is whether the Bank Board satisfied the requirement of 12 U.S.C. § 1729(c)(2)(B) before it appointed the FSLIC as federal receiver.[5]

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[4]With the FSLIC's financial assistance, Fidelity Federal has carried on the business of Fidelity from April 13, 1982 to the present.

[5]Section 1729(c)(2)(B) requires that the Bank Board determine that one or more of the grounds specified in 12 U.S.C. § 1464(d)(6)(A) exists before it may appoint the FSLIC federal receiver. These grounds include (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) *substantial dissipation of assets or earnings due to* any violation or violations of law, rules, or regulations, or to *any unsafe or unsound practice or practices;* (iii) *an unsafe or unsound condition to transact business;* (iv) willful violation of

The district court, 540 F.Supp. 1374, held that the Bank Board had not met the statutory prerequisites for the appointment of a federal receiver. The court found that there had not been a closing under state law and that no depositor had been unable to withdraw his funds. The court ordered the Bank Board to remove the federal receiver and return to Fidelity certain assets in the possession of the federal receiver.[6] This appeal followed.

II.
ISSUES TO BE RESOLVED

The issues before us are legal; therefore, our review is *de novo*. *First Charter Financial Corp. v. United States*, 669 F.2d 1342, 1345 (9th Cir. 1982). Substantial deference, however, is ordinarily due a contemporaneous interpretation of the statute by the agency responsible for its administration, as we have before us here. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Sierra Pacific Power Co. v. EPA*, 647 F.2d 60, 65 (9th Cir. 1981). That interpretation by the Bank Board is that the closing and withdrawal requirements of section 1729 (c)(2)(A) and (C) are satisfied whenever the FSLIC is appointed as state receiver for the purpose of liquidation.

The statutory setting in which these requirements appear is as follows. The Home Owners' Loan Act, 12 U.S.C.

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a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. (emphasis added). 12 U.S.C. § 1464(d)(6)(A)(i)-(v).

[6]Specifically, the assets ordered transferred to Fidelity are a lawsuit against the San Francisco Bank, *see supra* note 1, and a claim for the net worth, if any, of Fidelity on April 13, 1982.

§§ 1461-1468 (1976 & Supp. I 1977), and the National Housing Act, 12 U.S.C. §§ 1701-1750g (1976 & Supp. I 1977), give the Bank Board and the FSLIC regulatory authority over federal savings and loan associations and, to a lesser extent, over state-chartered associations whose accounts are insured by the FSLIC. The FSLIC may become the receiver for a state-chartered savings and loan by one of two means. Section 1729(c)(1) authorizes the FSLIC to accept an appointment by a state to act as state receiver for the purpose of liquidation if a state-chartered association is in default. "Default" is defined by section 1724(d) to mean an adjudication or determination by a proper authority "pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation." Under these circumstances section 1729(c)(1) vests the FSLIC with the same powers given it by section 1729(b) over federally chartered savings and loans, subject to the regulation of the public authority that appointed it. *See* 12 U.S.C. § 1729(d); *Hancock Financial Corp. v. Federal Savings & Loan Insurance Corp.*, 492 F.2d 1325, 1327 (9th Cir. 1974). Section 1729(c)(2) authorizes the Bank Board to "federalize" the receivership of a state-chartered association by appointing the FSLIC receiver (and thus ending state control of the receivership) provided that the section's three statutory preconditions have been satisfied: (1) that either a state receivership has been in place for at least fifteen days or an insured institution has been closed under state law; (2) that at least one ground specified in 12 U.S.C. § 1464(d)(6)(A) exists with respect

to such institution; and (3) that a depositor has been unable to make a withdrawal of his account.[7]

The exclusive means for contesting the appointment of the FSLIC as federal receiver under section 1729(c)(2) is provided by 12 U.S.C. § 1464(d)(6)(A), made applicable by 12 U.S.C. § 1729(c)(3)(A).[8] This section authorizes the

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[7] 12 U.S.C. § 1729(c)(2) provides:

(2) In the event the Federal Home Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution.

[8] 12 U.S.C. § 1464(d)(6)(A) provides:

The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. . . . In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court . . .

district court to conduct a hearing "upon the merits" concerning the propriety of the appointment of the federal receiver under 12 U.S.C. § 1729(c)(2). Upon a finding that one or more of the conditions for appointment of the federal receiver have not been satisfied, the district court shall order the Bank Board to remove the FSLIC as federal receiver.

This case, therefore, turns on whether the "closing" and the "withdrawal" requirements of sections 1729(c)(2)(A) and (C) were satisfied. We hold that each should be resolved by finding that the requirement has been satisfied.

III.

CLOSING OF FIDELITY UNDER CALIFORNIA LAW

A. Power to Close Under California Law

The district court held that no closure occurred within the meaning of section 1729(c)(2)(A). It reasoned that the Commissioner had no express or implied power to close Fidelity under California law. In addition, the district court found that even if it were to imply the power to close Fidelity from California Financial Code § 9010, the Commissioner, under California law, was stayed from exercising the power for ten days following seizure in order to allow the association to seek judicial review. We disagree.

The Commissioner may take possession of a savings and loan association operating in an unsafe or injurious manner and conduct its business until control is returned to

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for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver.

the association or the association's affairs are liquidated. Cal. Fin. Code §§ 9001, 9002, 9011 (West 1981); *Pacific States Savings & Loan Co. v. Hise,* 25 Cal.2d 822, 835-36, 155 P.2d 809 (1945) (en banc.) Admittedly, no provision in the Financial Code expressly states that the Commissioner may close an association. The California Supreme Court, however, has broadly construed the statutory powers of the Commissioner. *Evans v. Superior Court,* 20 Cal.2d 186, 190-91, 124 P.2d 820 (1942) (*Evans II*); *Evans v. Superior Court,* 14 Cal.2d 563, 572, 96 P.2d 107 (1939), *appeal dismissed,* 309 U.S. 640, 60 S.Ct. 893, 84 L.Ed 995 (1940) (*Evans I*); *Wilson v. Superior Court,* 2 Cal.2d 632, 635-37, 43 P.2d 286 (1935). Recognizing the legislature's intent to provide a comprehensive plan for supervising state savings and loans, *Trede v. Superior Court,* 21 Cal.2d 630, 633-34, 134 P.2d 745, *cert. denied, Pacific States Savings & Loan Co. v. Trede,* 320 U.S. 739, 64 S.Ct. 39, 88 L.Ed. 438 (1943), the California Supreme Court has found that the Commissioner has implied powers beyond the express provisions of the statutes substantially similar to those of a trustee of private property. *See Evans I,* 14 Cal.2d at 572-73, 96 P.2d 107. The power to close an association surely is among the powers properly implied from the Commissioner's power to take possession of an association for the purpose of liquidation.

California Financial Code § 9010 also supports this result. It provides that the Commissioner may take "such other acts as are necessary or expedient to collect, conserve, or protect the association's business, property, and assets." *See also* Cal. Fin. Code § 5250. To conserve effec-

tively a failing association's assets, the Commissioner must have the power to close an association when in her discretion it is necessary.[9]

Furthermore, where the FSLIC has been appointed state receiver by the Commissioner, as in this case, a reasonable interpretation of Financial Code § 9103 is that the FSLIC has the power to close a state-chartered savings and loan association. That is true because section 9103 provides that the FSLIC shall have all the powers and be subject to all the duties of the Commissioner, "and in addition shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted." California law thus incorporates all federal law concerning the powers of the FSLIC as receiver. Where the FSLIC has been appointed for the purpose of liquidation, federal law authorizes it to "take such action as may be necessary to put [the association] in a sound and solvent condition, . . . or to proceed to liquidate its assets in an orderly manner." 12 U.S.C. § 1729(b); *see also* 12 U.S.C. § 1729(d); 12 C.F.R. §§ 549.3, 56a6 (1982).[10] The FSLIC's power to liquidate "in

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[9]California law also recognizes the power of the California Superintendent of Banks to close banks, although there is no express statutory authorization for such power. *State Sav. & Commercial Bank v. Anderson*, 165 Cal. 437, 446, 132 P. 755 (1913), *aff'd mem.*, 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488 (1915); Cal. Fin. Code § 3100. This authority is significant in light of the fundamental similarity between banks and savings and loans and their parallel supervision by the state. *North Am. Bldg. & Loan Ass'n v. Richardson*, 6 Cal.2d 90, 101, 56 P.2d 1221 (1936).

[10]Where the FSLIC is appointed state receiver under section 1729(c)(1), it has the same powers and duties conferred upon it when acting as a federal receiver for federally chartered savings and loans under 12 U.S.C. § 1729(b). 12 U.S.C. § 1729(c)(1).

an orderly manner" necessarily includes the power to close a savings and loan, a power given by federal law and explicitly incorporated into California law by section 9103.

We also disagree with the district court's holding that closure on April 13, 1982, was precluded by Financial Code § 9003, which provides an automatic ten-day stay of liquidation following the taking possession of an association by the commissioner.[11] In *Evans II*, the California Supreme Court stated that the thirty-day stay period authorized by California Financial Code § 13.12, the predecessor to Financial Code § 9003, "is provided as an automatic stay of the exercise of the powers of liquidation by the Commissioner, *as distinguished from a stay of the process of liquidation*, in order to give the association an opportunity to obtain an injunction" (emphasis added). 20 Cal.2d at 189, 124 P.2d 820 (dictum). This distinction appears to be aimed at safeguarding the right to a review in the state court while at the same time recognizing the existence of those powers necessary to protect the assets from further deterioration and impairment pending such review. Thus, seizure of an association and the holding of its assets is a part of the *process* of liquidation. 20 Cal.2d at 189, 124 P.2d 820. *See also Trede*, 21 Cal.2d at 634, 134 P.2d 745 (right of Commissioner to liquidate association is delayed pending the outcome of suit challenging Commissioner's actions); *State Savings & Commercial Bank v.*

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[11]Section 9003 provides:

> Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 10 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, to enjoin further proceedings.

Anderson, 165 Cal. 437, 447-48 (1913), *aff'd mem.*, 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488 (1915) (parallel provision of Bank Act allows superintendent to take temporary custody of bank pending action challenging superintendent's findings.)

It is true, however, that *Evans II* did not address the question whether "closing" is to be regarded as part of the *power* of liquidation rather than the *process* of liquidation. 20 Cal.2d at 189, 124 P.2d 820. We believe the latter is the more apt characterization. Before "closing" sequentially must precede the definitive acts of liquidation and frequently will be necessary to preserve the assets, closing should be viewed as part of the *process* of liquidation under California law. So regarded, a closing is not subject to an automatic stay.[12] *Cf. Title Guaranty & Surety Co. v. Idaho*, 240 U.S. 136, 141-42, 36 S.Ct. 345, 60 L.Ed.2d 566 (1916) (distinguishing "closing" from "liquidation" for purposes of the Due Process Clause of the Fourteenth Amendment). An automatic ten-day stay of the Commissioner's power to close an association following its seizure could result in a run on the association that would impair or destroy the Commissioner's ability to protect association assets in the interest of creditors and claimants pending liquidation of an insolvent association. Cal. Fin. Code § 9010; *Trede*, 21 Cal.2d at 633-34, 134 P.2d 745.

This interpretation fully satisfies the requirements of procedural due process. *North American Building-Loan Ass'n v. Richardson*, 6 Cal.2d 90, 101, 56 P.2d 1221 (1936). The post-seizure review provided by section 9003 affords a constitutionally proper procedure. Allowing the Com-

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[12]We do not reach the question whether § 9003 requires an automatic 10-day stay of exercise of the *power* of liquidation.

missioner to close the association before ten days have passed not only is sensible but also constitutionally impeccable. Thus, the FSLIC acting as state receiver had the power under California law to close Fidelity immediately upon taking possession.[13]

B. *Actual Closure*

The district court also held that the closure requirement of section 1729(c)(2)(A)(ii) was met only when an association "actually closed its doors to the public." A "CIA-like operation where the FHLBB orchestrates a neat five-minute 'closure'" was not sufficient. Excerpt of Record C.T. 101 at 13. Fidelity urges us to adopt the district court's approach, arguing that a closing under section 1729(c)(2)(A)(ii) requires a significant disruption in the services of a state savings and loan association. The Bank Board and the FSLIC, on the other hand, assert that when-

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[13]In the alternative, state law may not be dispositive of compliance with § 1729(c)(2)(A)(ii). In *Tel. Sav. & Loan Ass'n v. FSLIC*, ——F.Supp.——, No. 80 C 2792, slip op. at 13-14 (N.D. Ill., June 9, 1981), the district court concluded that the closing requirement of 12 U.S.C. § 1729(c)(2)(A) is met whenever an association is closed by the state regardless of the validity of that closing under state law. The legislative history of § 1729(c)(2) supports this reading of the statute. The Senate Report states:

> The effect of the legislation would be to enable the FSLIC to defend its appointment under Federal law instead of requiring it to defend the legality of the State savings and loan administrator's determinations under State law.

S. Rep. No. 1263, 90th Cong., 2d Sess. 11, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2530, 2540. This statement evidences a congressional judgment that the effectiveness of a federal receivership depends on its being tested under uniform federal law. Given our interpretation of California law, however, we need not rely on this reading of the statute. We need not, however, rely on this reading of the statute based upon our interpretation of California law.

ever the FSLIC is appointed as state receiver for the purpose of liquidation the closing requirement is satisfied. Neither the statute nor the legislative history offer definitive guidance. For the reasons that follow, we hold that when the Commissioner both appoints the FSLIC as state receiver and issues an order liquidating the state institution, the closing requirement of section 1729(c)(2)(A) is satisfied.

The enactment of section 1729(c)(2) by Congress was in response to the refusal of Illinois banking officials to cooperate with federal authorities after the collapse of the Marshall Savings and Loan Association in 1965. There state officials dealt with the association's financial difficulties by taking custody of the association and suspending all withdrawals for over three months. State custody was aimed at conserving shareholder assets rather than for the purpose of liquidation. FSLIC insurance payments could not be made until a receiver had been appointed for the purpose of liquidation, thus placing the association in default. 12 U.S.C. §§ 1724(d), 1728(b). Therefore, the FSLIC was powerless to provide insurance payments to depositors during the three-month period preceding the state's appointment of a receiver for liquidation, even though the depositors had been denied access to their savings. This inability to promptly reimburse depositors jeopardized public confidence in the savings and loan industry. S.Rep. No. 1263, 90th Cong., 2d Sess. 7, 8, 11, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2530, 2536, 2537, 2540 (hereinafter S. Rep.).

Because the State of Illinois did not appoint the FSLIC receiver for liquidation, the FSLIC was unable to manage the association's assets in such a way as to recoup the

federal insurance fund payout. The state-appointed receiver denied the FSLIC access to the association's financial records, allowed the association's assets to deteriorate, and failed to reimburse the FSLIC for any portion of the insurance payments made to its depositors. The FSLIC ultimately lost $83 million in insurance payments and $12 million more in foregone interest. S. Rep. at 2536-37.

Section 1729(c)(2) was designed, generally speaking, to deal with this type of situation, in which at the time the state official has custody of the assets a state of hostility exists between the official and the FSLIC. More specifically, it was designed to heighten public confidence in the savings and loan industry by ensuring prompt insurance payouts to savers and to safeguard the financial integrity of the FSLIC by providing it with a means to "federalize" a hostile state receivership.[14] Under section 1729(c)(2) "federalization" is possible even when the state receivership is not for the purpose of liquidation. S. Rep. at 2539-40. At the same time, Congress recognized a legitimate and competing state interest in regulating state-chartered associations. A balance was struck by dividing the responsibility for regulation of state savings and loan associations between the states and the federal government. *See* S. Rep.

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[14]Senator Bennett stated:

> The bill has two purposes. The first . . . authorizes the Federal Savings and Loan Insurance Corporation to make *immediate payment to savers* having shares in a savings and loan institution *closed by State authorities* . . . . The second purpose of the bill is to provide for the appointment of the Federal Savings and Loan Insurance Corporation as a receiver *in any instance where it is required to use insurance funds* of the Corporation to meet its liability to the State institution's savers.
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> 114 Cong. Rec. 11,725 (1968) (emphasis added).

at 2538. The requirements of a closure under state law and a determination of depositor inability to withdraw funds were meant to safeguard the state receivership from premature federal intervention.

Although the primary purpose of section 1729(c)(2) is reasonably clear, its language plainly applies beyond the narrow Marshall Savings and Loan context. The Marshall episode represented a "hostile" situation. The present case presents a different situation. The State Commissioner has acted to further Bank Board and FSLIC objectives by appointing the FSLIC state receiver. Thus, the relationship between the State of California and the FSLIC may appropriately be described as nonhostile. The withdrawal by the Commissioner of her appointment of the FSLIC on July 27, 1982 does not alter this characterization.[15]

In the nonhostile situation the state's interest is served by advancing the federal interest. No fundamental dif-

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[15]In her Order terminating the appointment of FSLIC as state receiver, the validity of which is not before us, the Commissioner recited the circumstances which in her view made the removal of the FSLIC appropriate. These included the fact that as federal receiver the FSLIC has sold and transferred substantially all of the assets and liabilities of Fidelity to a new federal mutual savings and loan association (Fidelity Federal), and that consequently no depositor's funds were now at risk. Order of Linda Tsao Yang, Savings and Loan Commissioner of the State of California, Removing State Receiver and Extinguishing State Receivership (July 27, 1982), attached to Letter from Thomas P. Vartanian, General Counsel, Federal Home Loan Bank Board, to Philip B. Winberry, Clerk, United States Court of Appeals for the Ninth Circuit (Aug. 9, 1982) (filed Aug. 10, 1982). We infer from the wording of the Commissioner's order that the goal of safeguarding depositor funds was a motivating factor in her original decision to cooperate with the Bank Board by appointing FSLIC state receiver.

ference in objectives exists between the two. State officials have invited federal intervention by choosing to appoint the FSLIC state receiver and ordering the association's liquidation. No need to protect the state from unwanted federal meddling exists. Compliance with the preconditions of closure and withdrawal inability inescapably becomes substantially a ceremonial formality.

The district court would require an actual physical closure of the doors of the association for at least more than five minutes. Perhaps closure for one-half day would suffice. To require a closure of that duration under the circumstances of this case is to insist upon an empty ceremony. The formalities that attended the issuance by the Commissioner of her liquidation order and the appointment of the FSLIC as state receiver amply validated the utility of federal intervention. To require additional validation consisting of a ceremonial closure and denial of withdrawal by at least one depositor whose appearance is prearranged by the Commissioner and the Board is to require enactment of a farce. To the extent closure and denial of withdrawal are required not to be by prearrangement, the rule imposes upon the relevant financial community an unnecessary risk of depositor panic.

Section 1729(c)(2) should not be interpreted to require either the incurring of this risk or the performance of empty ceremonies. Therefore, we hold that the issuance of a liquidation order and the appointment of the FSLIC as state receiver of Fidelity by the Commissioner achieved a closure within the meaning of section 1729(c)(2)(A). The State of California, appearing as amicus curiae, acknowledges that had the Commissioner's liquidation order specifically included a provision closing Fidelity, any basis for insisting that the closure requirement was

not met would be removed. However, inasmuch as the language of the Commissioner's order tracked the language of the California statute which, as already demonstrated, empowers closure, its omission from the order is not significant.

We recognize that we are interpreting section 1729 (c)(2) teleologically, not literally. That is, our interpretation is guided by a desire to fit the section to nonhostile situations in which the Bank Board and the state authority concur in the need to accomplish quickly and smoothly the imposition of a federal receivership of a state savings and loan association. To frustrate this joint desire by insistence upon ceremonies that are meaningless, at best, and financially dangerous, at worst, strikes us as unwise.

We reach this conclusion although insistence upon these ceremonies would serve to enhance the analytic meshing of subsection 1729(c)(1) and (c)(2). Under our interpretation, appointment of the FSLIC as receiver by the appropriate state authority upon "default" of a state savings and loan association can be converted from a receivership under state law to one under federal law quite easily. The section 1729(c)(1) requirement of "default" can be counted upon to supply the section 1729 (c)(2) elements of closure and inability to withdraw in most instances. It can be argued that only by insistence upon ceremonial closure and denial of withdrawal, at the very least, can the intent of Congress expressed in enacting section 1729(c)(2) be harmonized with, and made sufficiently independent of, section 1729(c)(1). An even broader argument would be that section 1729(c)(2) is only available in the "hostile" situation such as existed with respect to the Marshall Savings and Loan Association.

We reject these arguments. To us promulgation of a liquidation order by proper state authority under state law that authorizes immediate closure joined with appointment of the FSLIC as state receiver permits federalization of the receivership by the Board, if it should choose to do so, provided the preconditions of section 1729(c)(2)(B) also exist. The language of the statute permits our interpretation and it does no disservice to the interests of depositors for whose protection the FSLIC exists.

Our interpretation also does no harm to the states. The appropriate state authority need not promulgate the liquidation order nor appoint the FSLIC as receiver. The fact that the Board may urge strongly that the state authority issue these orders alters nothing. It is within the state's power to refuse and to force into existence the literal fulfillment of the closure and inability to withdraw preconditions to federal intervention. That this might be a very imprudent thing for the state to do merely strengthens the case for the interpretation we give the statute.

Nor does our interpretation impose upon the shareholders of a state savings and loan association a deprivation of due process. The precondition set forth in section 1729(c)(2)(B), which requires that proper grounds for the intervention exist, assures stockholders that federal intervention was proper. Under the circumstances of the case and in light of the importance to society of preserving faith in our financial institutions, we hold, in a manner similar to our analysis of California law, that a post-intervention hearing with respect to the propriety of the grounds for federal intervention amply satisfies the shareholders' right to procedural due process. *Fahey v. Mallonee,*

332 U.S. 245, 253-54, 67 S.Ct. 1552, 1554-56, 91 L.Ed. 2030 (1947) (appointment of conservator for savings and loan by Bank Board under Home Owners' Loan Act); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300, 101 S.Ct. 2352, 2372, 69 L.Ed.2d 1 (1981) (citing *Fahey*); *Parratt v. Taylor*, 451 U.S. 527, 538-39, 101 S.Ct. 1908, 1914-15, 68 L.Ed.2d 420 (1981) (same).

IV.

DEPOSITOR INABILITY TO WITHDRAW

Our approach to the requirement of closure foreshadows our view of the district court's holding that because the Bank Board could not identify any depositor who was unable to withdraw funds from his account, the withdrawal requirement of section 1729(c)(2)(C) was not satisfied. We reject this holding. Section 1729(c)(2)(C) does not require that an account holder *actually be denied* a withdrawal; it only requires that the Bank Board determine that an account holder is *"unable"* to make such a withdrawal. The Bank Board properly so determined in this case. The required inability follows logically from the conclusion that Fidelity was closed.

Logic alone, however, need not carry the full burden of this conclusion. We have already indicated that under the circumstances of this case a ceremonial denial of withdrawal by one or more accountholders would serve no useful purpose. Thus, proceeding as we did in our treatment of the closure requirement, we hold that when the Commissioner promulgated her liquidation order and her appointment of the FSLIC as state receiver, and the Board accepted the appointment, the requirement of inability to withdraw was met. We believe that Congress did not in-

tend to require a ritualistic and potentially harmful disruption of business as a prerequisite to a federal receivership where the state has, by appointing FSLIC receiver, manifested its desire to yield control to and cooperate with the Bank Board. Here, as in connection with the closure precondition, we reject possible more narrow interpretations of section 1729(c)(2). We therefore find that the withdrawal requirement was satisfied in this case.

V.

DISPOSITION

In light of our holdings in this case, we need not consider Fidelity's cross-appeal from the district court's refusal to require appellants to extend the same loans and guarantees to Fidelity that were made available to its successor, Fidelity Federal. The judgment of the district court, 540 F.Supp. 1374, is reversed. We remand to the district court for further proceedings consistent with this opinion and specifically to allow consideration of the question whether any one of the conditions required by 12 U.S.C. § 1729(c)(2)(B) existed prior to the Bank Board's appointment of the FSLIC receiver.

REVERSED and REMANDED.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 1592 SW

FIDELITY SAVINGS AND LOAN ASSOCIATION,
Plaintiff,
v.
FEDERAL HOME LOAN BANK BOARD, et al.,
Defendants.

ORDER CERTIFYING INTERLOCUTORY APPEAL

[Filed June 9, 1982]

Defendants Federal Home Loan Bank Board ("Bank Board") and Federal Savings and Loan Insurance Corporation ("FSLIC") have requested an order certifying for interlocutory appeal this Court's memorandum orders dated June 3 and 4, 1982, attached hereto, which require the Bank Board to remove the federal receiver it appointed for plaintiff Fidelity Savings and Loan Association ("Fidelity") and require FSLIC to transfer to Fidelity the assets in the possession of FSLIC as federal receiver (i.e., Fidelity's claim against the Federal Home Loan Bank of San Francisco and a claim for the net worth of Fidelity, if any, at the time of appointment of the federal receiver).

The Court, having considered defendants' request, having reviewed the pleadings and files herein, having heard the oral argument of counsel at the hearings of the orders referred to above, and having considered all of the above, hereby finds that all of the criteria for certification

of an interlocutory appeal, as set forth in 28 U.S.C. § 1292 (b), are satisfied as follows:

(1) The issues presented are controlling questions of law which have significance beyond the adjudication of this case. The Court's orders will invalidate the purported appointment of FSLIC as federal receiver of Fidelity pursuant to 12 U.S.C. § 1729(c)(2) and will require that assets held by the federal receiver be returned to Fidelity. The Court's orders leave for determination by the Court the amount and extent of any assets remaining in the hands of the federal receiver, including any net worth of Fidelity.

(2) There is substantial ground for difference of opinion as to the controlling questions of law referred to above.

(3) An immediate appeal from the Court's orders will materially advance the ultimate termination of this litigation.

NOW, THEREFORE, in consideration of the foregoing:

IT IS HEREBY ORDERED, pursuant to 28 U.S.C. § 1292(b), that the orders referred to above and attached are certified for immediate appeal and that proceedings in this Court are stayed until 12:00 a.m. on June 14, 1982, pending the application for appeal to the Ninth Circuit Court of Appeals. The Court declines to stay its proceedings after June 14, 1982.

IT IS FURTHER REQUESTED, that the Court of Appeals expedite the appeal certified herein.

DATED: June 9, 1982.

/s/ SPENCER WILLIAMS
United States District Judge

Appendix D

FIDELITY SAVINGS AND LOAN ASSOCIATION, Plaintiff,

v.

FEDERAL HOME LOAN BANK BOARD, et al., Defendants.

No. C-82-1592 SW.

United States District Court,
N. D. California.

May 24, 1982.

On Removal of Receiver June 3, 1982.
On Remedies June 4, 1982.

MEMORANDUM AND ORDERS

SPENCER WILLIAMS, District Judge.

Plaintiff Fidelity Savings and Loan Association (Fidelity) brings this action to remove the Federal Savings & Loan Insurance Corporation (FSLIC) as receiver of its assets and for such other equitable relief as it deems is necessary and permissible under the statute to place it in the same position it occupied on the date of the appointment. Defendants Federal Home Loan Bank Board (FHLBB) and FSLIC filed a motion for summary judgment on the ground that there are no material issues of fact concerning the satisfaction of the statutory prerequisites for appointment of a receiver. After careful consideration of the excellent and exceedingly thorough briefs of all parties, the court concludes that the motion must be denied at this time. The following constitutes a brief explanation of the court's reasoning.

APPLICABLE LEGAL STANDARDS

The jurisdiction of this court is predicated on Title 12 U.S.C. § 1464(d)(6)(A) which provides that the FHLBB may appoint a receiver for a savings and loan association *ex parte* and without notice when it feels, in its opinion, that an adequate ground for such appointment exists under the law. The statute specifically outlines the association's remedy:

> In the event of such appointment [of a receiver], the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board [FHLBB] to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver.

The statute further spells out that an action under the above-quoted statute is the sole and exclusive method by which an association may affect removal of the receiver. 12 U.S.C. § 1464(d)(6)(C).

When assessing the propriety of the FHLBB's exercise of power to appoint a receiver, the court must examine the statutory requirements for such an appointment. Title 12 U.S.C. § 1729(c)(2) states that the FHLBB shall have exclusive power and jurisdiction to appoint the FSLIC as the receiver of an insured state savings and loan association if it determines:

> (A) that . . . (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;

> (B) that one or more the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, . . .; and
>
> (C) that one or more the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

Section 1464(d)(6)(A), referred to in subsection (B) of section 1729(c)(2) permits the appointment of a receiver whenever the association is in "an unsafe or unsound condition to transact business."

STANDARD OF REVIEW

The parties to this action dispute the standard by which the court is to review a determination by the FHLBB that the three requirements of section 1729(c)(2) have been met. Fidelity, on the one hand, seeks a trial *de novo* on both the existence of facts supporting a 1729(c)(2) determination *and* the exercise of that jurisdictional power by the FHLBB. On the other hand, FSLIC and the FHLBB argue that the court's power of review is limited to a *post facto* adversarial hearing on whether the statutory grounds were present.

A reasoned analysis of this question begins and ends with an inquiry into the meaning of the term "on the merits" contained in the grant of jurisdiction contained in section 1464(d)(6)(A). Initially, the court concludes, as did Judge Grady in *Telegraph Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, No. 80 C 2792 (N.D. Ill., filed June 9, 1981), that this phrase necessarily

implies that the court's power to review the FHLBB's determination is not bound by the normal limitations applicable to an administrative review of an agency's previous adjudication. *See* 5 U.S.C. § 706(2)(E). If it means nothing more, the term "on the merits" reveals that a proceeding under this statute is more in the nature of a *de novo* review than an appellate review. *Cf. Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 354-55, 81 S.Ct. 1570, 1573-74, 6 L.Ed.2d 890 (1961).

Clearly, the ordinary reasons calling for deference to an administrative decision are not present in the instant situation. There were no adversarial hearings before the agency and there was no identifiable administrative record. *See generally Washington Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 526 F.Supp. 343 (N.D. Ohio 1981). Moreover, the statute giving rise to the agency's jurisdiction in no way contemplates any limitations on this court's powers of review. The statute calls for an expedited hearing on the merits of the Board's decision and allows the court to reverse completely the appointment decision as opposed to remanding the case for further consideration.

Accordingly, the court concludes that, in light of the serious due process considerations, the plaintiff is entitled to a full adversarial hearing on the question whether the three prerequisites listed in section 1729(c)(2) were present in this action. As to this question, the court sits not as an appellate body but as independent reviewer of the evidence. Therefore, Fidelity must be accorded the opportunity to present evidence and cross examine witnesses on the question of whether the FHLBB's conduct met the statutory requirements. Because the agency's decision is entitled to a minimal presumption of correctness, *Citizens*

to Preserve Overton Park v. Volpe, 401 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1970), the plaintiff bears the burden to show the agency's decision was incorrect by the weight of the evidence.

However, the court's power to reexamine the Board's decision is not unlimited. On the contrary, the normal rule that fundamental policy questions should be resolved by the legislative and executive branches and not by the courts applies with equal force to the present situation. *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1977). This court is not to substitute itself for the Federal Home Loan Bank Board in the decision to *exercise* its jurisdiction, if it is present. Rather, once the court determines that the three statutory prerequisites have been satisfied, it will not disturb the decision of the Board to exercise its jurisdiction unless there has been an abuse of discretion in the exercise of that power.

Therefore the issues before this court are (1) whether, when looking at all the evidence that was available to the Board and that information subsequently discovered, the three statutory prerequisites were satisfied; and (2) whether the Board's exercise of jurisdiction constituted an abuse of discretion.

MOTION FOR SUMMARY JUDGMENT

The defendants have moved for summary judgment on the ground that all the facts demonstrate that the decision to appoint a receiver was premised on a supportable factual base. After careful consideration of all the briefs and arguments of counsel and all the evidence presently in

the record, the court concludes that the motion must be denied at this time. Questions of fact remain as to Fidelity's financial condition at the time the receiver was appointed. Moreover, the questions of closure and unwithdrawable accounts require a further factual understanding before the questions can be resolved as a matter of law. Like many "fact-law" decisions (e.g. personal jurisdiction), the questions on closing and withdrawals can be resolved once all facts are properly presented to the court.

Accordingly, the court will bifurcate the trial and try the questions of closure and unwithdrawable accounts before the court reaches the issue of "unsafe and unsound condition." After all facts as to the closure and unwithdrawable accounts are presented, the court will determine these questions as a matter of law.

CONCLUSION

IT IS HEREBY ORDERED that the defendants' motion for summary judgment be, and hereby is, denied without prejudice to being renewed at the conclusion of the first part of the bifurcated trial.

IT IS FURTHER ORDERED that the defendants' motion in limine is denied.

IT IS FURTHER ORDERED THAT the trial of this action be bifurcated trying the issues of closure, nonwithdrawable accounts and "unsafe and unsound condition" *seriatam.*

IT IS SO ORDERED.

ON REMOVAL OF RECEIVER

INTRODUCTION

This action raises extremely important questions concerning the timing of federal intervention in the seizure of a state savings and loan association and the degree to which the Federal Home Loan Bank Board (FHLBB) may manipulate the nature of a takeover so as to satisfy strict statutory prerequisites to such action. Resolution of these questions requires that the court examine the manner in which Congress balanced the need for prompt federal response to failing financial institutions against the need to protect such institutions from arbitrary or precipitous federal takeovers in violation of such institutions' due process rights.

After careful consideration of all the relevant facts and a thorough reading of the applicable legislative history, the court concludes that the FHLBB acted precipitously and overzealously in appointing a federal receiver for the plaintiff Fidelity Savings and Loan Association. No matter how well-intentioned or motivated by apparent economic necessity its actions, the FHLBB acted in violation of both the clear command of the applicable federal statute and the underlying policy which limited federal intrusion in the supervision of state associations. Accordingly, the court rules that the defendants failed to satisfy the statutory requirements and the receiver must be removed.

FACTUAL BACKGROUND

The genesis of this action goes back to 1979 when the plaintiff Fidelity Savings and Loan Association (Fidelity) gambled that interest rates would fall and began selling

large amounts of short-term paper to make long-term mortgage loans. Unfortunately for Fidelity, the gamble proved unwise as interest rates rose sharply and it was forced to roll over its short term borrowing. As a result, Fidelity experienced severe financial difficulties due to the increasing spread between the high cost of money and the interest that it earned on its low-yielding mortgage portfolio.

Consequently, Fidelity began suffering large operating losses and experienced a substantial loss in net worth. In an attempt to cope with its financial problems, Fidelity borrowed some $1.3 billion from the Home Loan Bank of San Francisco (the Bank) between October, 1979 and March, 1982. The Bank predicated its loans to Fidelity on placing the association in a "special credit category" by which it was charged interest rate penalties and higher interest than other borrowing associations.

In late 1981 and early 1982, while Fidelity was pursuing administrative relief from the special credit program, the Bank's President, Milton Feinerman and other members of the Bank staff began making suggestions to the State Savings and Loan Commissioner, Linda Tsao Yang, that she should take possession of Fidelity due to its liquidity crisis. In addition, Richard Pratt, Chairman of the Bank Board, and H. Brent Beesley, Director of defendant Federal Savings and Loan Insurance Corporation (FSLIC), made requests early in 1982 that the Commissioner take possession of Fidelity. Each time, the Commissioner refused and recommended that other alternatives be explored.

On April 5, 1982, Fidelity was notified in writing that the Bank would not grant it any relief from the special

credit program. Thereafter, on April 9, 1982, Fidelity filed a lawsuit against the Bank in this Court, No. C 82-1389 EFL, seeking recovery of the penalties and excess interest charges which totalled some $62.4 million. On that same day, the Bank's Executive Committee convened by telephone conference and, based in part on the massive "panic" withdrawals from Fidelity during the week of April 5, 1982, authorized Mr. Feinerman to advise the FSLIC that the Bank would not advance any additional funds to Fidelity unless FSLIC would guarantee such loans.

After FSLIC was notified of the Bank's decision, Mr. Feinerman and Mr. Beesley placed a conference call to Commissioner Yang to inform her that FSLIC would not guarantee any additional advances unless she acted to take possession of Fidelity and appoint FSLIC as receiver. Commissioner Yang engaged the federal officials in an hour long conversation in which she resisted State seizure and indicated that due to Fidelity's still present net worth she advocated an unconditional merger resolution. However, after further discussions, Mr. Beesley indicated that FSLIC was not concerned with protecting the shareholders' interests and that Fidelity's financial condition was so poor that a state receivership was the only acceptable solution. Faced with the situation where Fidelity would not receive any more money advances, the Commissioner testified that she had "no choice but to do what the Federal regulators wanted the State to do; to take possession of the institution and to appoint FSLIC the receiver." (Yang Deposition, p. 31, 11.19-22.)

The State Commissioner and the federal officials agreed that the State would take possession of the association at

the close of business on Tuesday, April 13, 1982 and turn it over to FSLIC as state receiver. Commissioner Yang testified that she wanted to insure a smooth transition in such a manner that the depositors and the public were completely unaffected by the appointment of the state receiver. (Yang Deposition, p. 34, 11.6-14; p. 157, 11.6-23; p. 164, 11.22-27.) The Commissioner did not contemplate that the doors to the association would be closed and she stated that the language contained in the State's Order Demanding and Taking Possession was intended merely to facilitate the matching of the technical legal language between state and federal law. (Yang Deposition, p. 169, 11.6-13; p. 171, 11.3-5.)

The only step remaining in the well-orchestrated federal takeover of the state savings and loan association was the physical seizure of the association. Over the weekend, the federal regulators dispatched hundreds of federal bank examiners from all over the country to California to serve in their appointed outposts in individual branches. On Tuesday, April 13, 1982, a handful of federal and state officials entered the Fidelity offices in Oakland, California at precisely 4:40 p. m., twenty minutes before closing. With watches synchronized, the officials entered Fidelity's executive offices and served the papers "closing" the association at 4:47 p. m. According to the testimony of Mr. Ronald Taylor, an attorney for the FHLBB who was part of the operation in Oakland, different members of the takeover team fanned out to tell other employees in the building of the association's seizure. Mr. Taylor also testified that there was some question as to whether the regulators should bar all doors but such was not done because some Fidelity employees needed to go home. There is a dispute

in the record as to whether all doors in all Fidelity offices actually were closed; however there is no dispute that the entire operation took less than thirty minutes.

Immediately thereafter, the State took possession of the business property and assets of Fidelity, Mr. Durkin, the Chief Deputy Savings and Loan Commissioner for the State of California, tendered the appointment as State receiver to FSLIC. Within a few moments later FSLIC terminated the State receivership by declaring itself to be the sole federal receiver based upon a series of resolutions that had been approved by the FHLBB the preceding day. At the same time, most of Fidelity's assets were transferred to a newly-created federal mutual association, Fidelity Federal Savings and Loan Association of San Francisco. This same mutual association has carried on the business from April 13, 1982 forward.

Shortly after the takeover, the plaintiffs brought this action pursuant to 12 U.S.C. § 1464(d)(6)(A) to remove FSLIC as receiver of its assets and for such other equitable relief as it deems is necessary and permissible under the statute to place it in the same position it occupied on the date of the appointment.

Pursuant to the mandate of the statute, this court established an expedited schedule for the trial of this action. After extensive discovery and the filing of numerous briefs on the legal and factual questions presented, the court on its own motion ordered that the issues of "closing" and "unwithdrawable accounts" be bifurcated and tried on the record before the court. *See* Fed.R.Civ.P. 42(b); *Richmond v. Weiner,* 353 F.2d 41, 44 (9th Cir. 1965), *cert. denied,* 384 U.S. 928, 86 S.Ct. 1447, 16 L.Ed.2d 531 (1966).

LEGAL STANDARDS

The jurisdiction of this court is based on Title 12 U.S.C. § 1464(d)(6)(A) which provides that the FHLBB may appoint a receiver for a savings and loan association *ex parte* and without notice when it feels, in its opinion, that an adequate ground for such appointment exists under the law. The statute provides:

> In the event of such appointment [of a receiver], the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board [FHLBB] to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver.

When assessing the propriety of the FHLBB's exercise of power to appoint a receiver, the court must examine whether the FHLBB met all the statutory prerequisites to such an appointment. Title 12 U.S.C. § 1729(c)(2) lists the three separate requirements that must be satisfied:

> (A) that . . . (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;
>
> (B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, . . .; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

In this part of the bifurcated trial, the court is concerned with independent requirements contained in subdivisions (A) and (C) above.

In determining whether the association was closed under the laws of the State of California,[1] the court must turn to the authority granted the Savings and Loan Commissioner under California law.[2] Section 9001 of the California Financial Code provides that the Commissioner may demand and take possession of the property, business and assets of an association if he or she determines that certain statutory conditions are present.[3]

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[1]All parties agree that the first alternative statutory precondition for creation of a federal receiver, i.e. the existence of a state receiver for 15 days, 12 U.S.C. § 1729(c)(2)(A)(i), was not met because the FHLBB appointed FSLIC the same day.

[2]Since FSLIC originally accepted appointment as a state receiver, Cal.Fin.Code § 9103 subjects it to all the duties of the Commissioner, including any limitations applicable to the power to close the association.

[3]Cal.Fin.Code § 9001 provides:

> The commissioner may demand and take possession of the property, business and assets of an association if any of the following occur:
>
> (a) The association does not comply with the order given pursuant to Section 9000, within the time specified therein.
>
> (b) It appears to the commissioner that the association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors.
>
> (c) The commissioner finds that the association's assets are impaired to such an extent that, after deducting all

Once the Commissioner takes possession of an association, he or she "may retain possession . . . until the association resumes business with the consent of and subject to the conditions imposed by the commissioner, or until its affairs are liquidated." Cal.Fin. Code § 9002. While the Commissioner may perform such other acts as are necessary to protect the association (Cal.Fin.Code § 9010), he or she must, unless he or she has been enjoined or has previously returned the association for the resumption of business, proceed to liquidation. Cal.Fin.Code § 9011.

Finally, the powers of the Commissioner are subject to immediate judicial review. Section 9003 of the Financial Code provides:

> Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 10 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, to enjoin further proceedings.

It is also settled that the ten day period is provided as an automatic stay of the exercise of the powers of the Commissioner to liquidate the association. *Evans v. Superior*

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liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the amount set aside as a fixed and permanent capital of the association pursuant to Section 6456 of the Financial Code.

(d) The association refuses to submit its books, papers, and accounts to the inspection of the commissioner or any of his examiners, deputies, or assistants.

(e) Any officer of the association refuses to be examined upon oath concerning the affairs of the association.

Court, 20 Cal.2d 186, 124 P.2d 820 (1942). Accordingly, the Commissioner is prohibited from undertaking any actions during the ten day period that would compromise the association's statutory right to challenge the seizure under state law. *Id.*

DISCUSSION

A. *Closing Under State Law*

The first statutory precondition for creation of a federal receivership in this case is that the association be closed under state law. 12 U.S.C. § 1729(c)(2). An examination of the relevant California statute and common sense both compel the conclusion that as a state receiver of Fidelity, FSLIC's actions in "closing" the association for a matter of minutes is insufficient.

As a state receiver, FSLIC stood in the same shoes with the same statutory powers as the Commissioner. Cal.Fin.Code § 9103. California law grants the Commissioner the power to take and retain possession, to operate the business, to oversee a reorganization, to return the business to the association or to liquidate. Cal.Fin.Code §§ 9001, 9002, 9011. *Pacific States Savings & Loan Co. v. Hise*, 25 Cal.2d 822, 155 P.2d 809 (1945). However, nowhere do the statutes give the Commissioner the power to close an association and such power does not exist unless it is following a decision to shut down the business and liquidate.

The defendants argue that these California statutes impliedly provide the power to close an association. First, defendants contend that the clause in section 9002 that permits the commissioner to retain possession "until the association resumes business" necessarily implies the pre-

existing power to close. Such an inference does not follow logically from the language and context of the statute. These provisions in the Financial Code concern the power of the Commissioner to take possession and have his or her office run the business until liquidation. As an alternative, the Commissioner may continue the business until such time that he decides to return it to the association for its *resumed* management. Clearly, to imply the virtually unreviewable and irreversible decision to close would violate the California legislature's sensitivity to the due process rights of the association. *See* Cal.Fin.Code § 9003; *Evans v. Superior Court,* 20 Cal.2d 186, 124 P.2d 820 (1942).

Second, the defendants submit that the Commissioner acquires the power to close a seized association under Cal.Fin.Code § 9010 which permits "such other acts as are necessary or expedient to collect, conserve, or protect the association's business, property, and assets." To the extent the power to close is an implied power under section 9010, such authority cannot be exercised for ten days after the Commissioner first takes possession in order for the association to seek judicial review under section 9003. The California legislative scheme, like its federal counterpart embodied in 12 U.S.C. § 1729(c)(2), evidences a particular sensitivity to the due process rights of associations subject to *ex parte* governmental takeovers. Accordingly, the California statute allows for an automatic ten day stay of any commission action pending judicial review. Cal.Fin.Code § 9003; *Evans v. Superior Court, supra.* Therefore any power to close implied under section 9010 could not be exercised if to do so would deprive the association of its

statutory right to state court review.[4] Since in the instant case, there could have been no valid closure for ten days after the appointment of the state receiver, the first requirement of section 1729(c)(2) was not met.

In summary, therefore, the Commissioner lacked the statutory authority to close Fidelity under either the express or implied provisions of the California Financial Code. In fact, the Commissioner's office has acknowledged that she lacked the authority to close a state savings and loan association. (Durkin Deposition, pp. 43-44.) Finally, even if the Commissioner did somehow acquire an implied power to close, the evidence demonstrates that in this case Commissioner Yang did not intend to affect a closure and was assured that the FSLIC receivership would not result in any operation of the association's daily business.

B. *Closing Under Federal Law*

The defendants basic argument under section 1729(c)(2)(A)(ii) is that any time FSLIC is appointed a state receiver it can simply declare an association "closed" (or enact the drama of closing all doors for one or two minutes) and have the FHLBB appoint it as a federal receiver. Such a reading would emasculate the independent and well-thought out prerequisites to federal intervention in the affairs of state savings and loan associations.

Section 1729(c)(2) was adopted as part of the Bank Protection Act of 1968, Pub.L. 90-389, 82 Stat. 294 (the Act). Before the passage of the Act, no federal regulatory body had the power to place a state-chartered savings and loan

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[4]To the extent the Commissioner desires judicial review before the expiration of the ten day period of acts not expressly authorized by this part, he or she may seek such confirmation pursuant to Cal.Fin.Code § 9012(a).

association in federal receivership. Under the old law, the FSLIC was only authorized to accept an appointment as receiver when the state association was in default and the receiver had been appointed for the purpose of liquidation. *See* 12 U.S.C. § 1724(d).

In 1968, Congress concluded that, in order to enable FSLIC to make prompt payments of insurance to depositors and to ensure an orderly disposition of assets, the Bank Board needed the authority to make FSLIC a federal receiver for state-chartered associations in certain circumstances. *See* 114 *Cong.Rec.* 18298 (1968). Congress was concerned with a limited type of problem that had arisen in the case of Marshall Savings & Loan Association where the association was placed in custody but not for the purpose of liquidation. Although the state authorities had the authority, they did not appoint FSLIC as a state receiver. As such, under then existing law, FSLIC was powerless to provide insurance for saving account holders for several months despite the fact that the institution was closed and it had suspended all withdrawals. It was only several months later when a receiver for the purpose of liquidation was appointed, that FSLIC payments were triggered. *See* 114 *Cong.Rec.* 18299.

The *Marshall* case posed several real problems for the federal regulators. First, the lengthy passage of time undermined public confidence in the safety and stability of state associations. Second, FSLIC was unable to monitor the state institution and preserve at the earliest possible stage the greatest percentage of assets. Finally, the account holders themselves were greatly prejudiced. 114 *Cong.Rec.* 17725.

In light of the possibility of state institutions avoiding FSLIC intervention even when they had been closed for substantial periods of time and when the institution was actually denying withdrawals, Congress enacted the 1968 legislation. In doing so, however, Congress recognized *two* competing interests: 1) FSLIC protecting its own funds and taking over as early as reasonable; and 2) Protecting the right of the states to regulate savings and loan associations without federal intervention until the most severe or urgent situation occurs such as near certain collapse. 114 *Cong.Rec.* 17726.

As originally introduced, S.3436 would have authorized the Bank Board to appoint FSLIC as federal receiver for an insured state association if (1) a conservator, receiver or other legal custodian has been appointed or the association has been closed under state law; and (2) the appointment is "advisable in the public interest." *Id.* The committee criticized the bill as to broad and affording state associations few legal challenges against the appointment of a federal receiver. *Id.*

In order to meet the objections, Congress established three *very objective standards* that must each be met before the federal regulators could take over a state institution. Congress expressly limited federal intervention to those urgent situations, as presented by the *Marshall* case, where the federal regulators had no independent means of protection and were forced to stand by and helplessly watch a state association close its own doors or be closed by an *independent* act of the state government.

In the present case, the federal regulators have placed the cart before the horse. Instead of waiting for the state to close the state association, the FHLBB played an active

role in the artificial creation of a closing under state law. Moreover, the Board failed to wait the required fifteen days to appoint FSLIC as a federal receiver notwithstanding that the State already had appointed FSLIC as a receiver under state law.

When Congress required a closure, it envisioned a situation where the association actually closed its doors to the public. Congress certainly did not envision a CIA-like operation where the FHLBB orchestrates a neat five-minute "closure" to affect a paper satisfaction of the statutory requirements with the state acting as an unwilling co-conspirator. Comity and due process require more.

C. *Failure to Make a Withdrawal*

In addition to requiring that the association be closed under state law, section 1729(c)(2) requires that "one or more of the holders of withdrawable accounts . . . is unable to obtain a withdrawal of his account in whole or in part." The defendants concede that they cannot identify any person who was unable to withdraw funds from a withdrawable account. However, they argue that once an association is closed under state law, depositors *ipso facto* cannot withdraw their funds. Such a statutory construction, while expedient to the facts of this case, would in essence write out the requirement from the statute. This court cannot abide such an interpretation.

It is well-established that "a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." *Woodfork v. Marine Cooks & Stewards Union,* 642 F.2d 966, 970-71 (5th Cir. 1981); *General Motors Acceptance Corporation v. Whisnant,* 387 F.2d 774, 777-78 (5th Cir. 1968). This rule applies with

special force to the present situation where the allegedly cumulative term was added by Congress by amendment to a bill that already contained the first requirement. 114 *Cong. Rec.* 17726.

In the present case, one need not conclude that this third requirement has no independent significance or, as defendants would hypothesize, only comes into play when the state custody lasts for a lengthy period of time. On the contrary, the requirement that a holder of a withdrawable account be denied a withdrawal is meant to narrow further the occasions when federal intervention in state takeovers will be permitted. It is at least possible that an association could be closed under state law and yet generate no run on the accounts. For whatever reason this might occur, the absence of *any* depositors being denied a requested withdrawal would be a situation where federal restraint would be in order.

In their final brief filed on these questions, the defendants attempt one final time to escape the straight-forward closure and nonwithdrawable accounts requirements. In short, the defendants argue that section 1729(c)(2)(A) and (C) do not apply where FSLIC has already been appointed state receiver. The short and simple answer to the defendants' inventive argument is that it fails to come to grips with the clear and unambiguous language of the statute. If the exercise of FSLIC authority as a state receiver under section 1729(c)(1) is sufficient to transform FSLIC immediately into a federal receiver then section 1729(c)(2) becomes mere surplusage and without meaning in a vast number of receivership cases. Such statutory construction is fundamentally unsound. *See, e.g., United States v. Wilson,* 591 F.2d 546, 547 (9th Cir. 1979).

CONCLUSION

It is, of course, well-established at this point in our decisional law that the drastic public and private consequences of a failing financial institution permits prompt and decisive *ex parte* regulatory action. *See, e.g., Fahey v. Mallonee*, 332 U.S. 245, 253-54, 67 S.Ct. 1552, 1555-56, 91 L.Ed. 2030 (1947). However, due to the serious consequences of such action, this regulatory authority must be exercised with great caution and restraint.

The court has no doubt that the defendants here were, as they saw it, acting in the best interests of the taxpayers, the depositors and the Industry. In effect, however, they were precipitous in their exercise of authority and failed to await the occurrence of the statutory preconditions in their natural time.

"The aim of the [1968] legislation is to enable the FSLIC to effect an orderly disposition of the assets of insured associations whose depositors have been reimbursed by FSLIC insurance payments." S.Rep.No. 1263, 90th Cong., 2d Sess. (1968), U.S.Code Cong. & Admin.News 1968, p. 2530. In this case, FSLIC had paid no funds to any Fidelity depositor. If the natural reaction to the relevant statutes is that FSLIC response will always be "too little, too late," the most appropriate focus of such comment is the Congress. As it presently reads, section 1729(c)(2) presents three clear and unambiguous prerequisites to federal intervention in this area.

Accordingly,

IT IS HEREBY ORDERED that the Federal Home Loan Bank Board shall remove the federal receiver forthwith.

The court will entertain further arguments and briefing as to the specifics of such additional relief as may be available to the parties hereto.

IT IS SO ORDERED.

ON REMEDIES

This action is presently before the court on the question of remedies available to a state savings and loan association whose assets were wrongfully seized by the Federal Home Loan Bank Board (FHLBB). This court has previously determined that the FHLBB's appointment of the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for the plaintiff Fidelity Savings and Loan Association (Fidelity) did not comply with the requirements enumerated in 12 U.S.C. § 1729(c)(2). The question now presented is the scope and effect of that order and any additional relief to which the plaintiff may be entitled.

The court has carefully considered the briefs and arguments of counsel and the applicable statutes and concludes that the appointment of the federal receiver extinguished any preexisting state receiverships. Additionally, the court concludes that the mandates of the due process clause contained in the Fifth Amendment to the United States Constitution require that all assets presently held by the federal receiver be returned to Fidelity and all actions taken under such receivership are voidable at the instance of the plaintiff as the aggrieved party. However, the court further concludes that it has neither the power nor the inclination to order the FHLBB or FSLIC to take any actions or

make any guarantees to Fidelity if it were to choose to reacquire the association's assets.

DISCUSSION

The defendants argue that the removal of the federal receiver by this court would result only in the return to the state receiver of any remaining assets and liabilities in the possession of the federal receiver. This court disagrees. When the FHLBB imposed a federal receivership, that action necessarily extinguished any preexisting state receiver and vested exclusive jurisdiction over such receiver with this court. 12 U.S.C. § 1464(d)(6)(A), (C); 12 U.S.C. § 1729(c)(2). In fact, the defendants previously took the correct position that federal law clearly was intended to permit the FHLBB to remove receiverships of state-chartered associations from the jurisdiction of the state courts and put them under the jurisdiction of the federal courts. (Defendants' Memorandum in Support of Summary Judgment, at p. 19.) As such, the state court receiver no longer existed as a matter of law and any remedies previously available to the association under state law could not be pursued.

Therefore, the question before this court is the scope of the remedy to be afforded the plaintiff for the wrongful seizure of its association. Section 1464(d)(6)(A) empowers this court to conduct a hearing *on the merits* and to order the FHLBB to remove the receiver for the state association. Section 1464(d)(6)(C) further provides that no court, other than the federal court hearing the action on the merits, may restrain or affect the exercise of powers or functions of the federal receiver, except at the instance of the FHLBB.

The defendants argue that the only power this court reserves in such a hearing is to remove the receiver, notwithstanding that the receiver may have already transferred some or all of the assets to a newly created association pursuant to section 1729(b)(4). This argument, if accepted, would render the plaintiff's statutory right to judicial review of the takeover meaningless. Clearly, fundamental concepts of due process and fairness require that the association has the right, if it chooses to exercise it, to render void the actions taken by the wrongfully appointed receiver and to reacquire its assets.

As a general rule, due process requires notice and an opportunity to be heard prior to a governmental deprivation of property. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). However, it is well-recognized now in the area of regulatory takeovers of failing institutions, *ex parte* governmental takings are permitted as long as the aggrieved association retains the ultimate right to a judicial review of the agency's action. Fundamental due process and fairness require that a meaningful hearing must be had *before* one is finally deprived of his property. *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 611, 94 S.Ct. 1895, 1902, 40 L.Ed.2d 406 (1974).

If this court were to accept the defendants' interpretation of the powers of this court under a section 1464(d)(6)(A) hearing, the federal regulators would be permitted to take over a state association in violation of statute yet successfully prevent reacquisition by immediately transferring the assets to a new association. While the need for swift and decisive action is great in the area for failing financial institutions, shielding federal regulators from

a meaningful judicial review of their actions clearly violates the precepts of fundamental fairness required by the fifth amendment. It was for this reason that Congress required for the most expedited of procedures to allow aggrieved state associations to challenge federal intervention.

Notwithstanding these principles, however, the court recognizes the need for federal regulators to take immediate actions to attempt to conserve the assets of a failing institution. *See Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947). Moreover, the court is also mindful that many of these steps may need to be taken before there is time for the expedited judicial review. Thus, in order to guarantee that those steps can be taken without the cloud of future litigation foreclosing many necessary actions, the court concludes that the actions taken by the federal receiver before a judicial determination are entitled to a facial determination of validity. As such, these actions are not void as a matter of law, but rather voidable and binding until they are voided by the party entitled to do so. *Cf. United States v. Peco International, S.A.,* 243 F.Supp. 250, 253 (D.Can.Zone 1965); 92 C.J.S., Void, pp. 1024-25.

This interpretation preserves both the integrity of interim federal actions and the due process rights of the aggrieved association. Specifically, it means that the aggrieved association can choose to render the federal receiver's actions void and have its assets returned or it can, if it deems it in its best interests, choose to ratify such actions and accept the removal of the receiver and the return of any assets held by that receiver as just compensation for the property seized by the government in violation of its due process rights.

In the present case, the plaintiff has indicated to the court through the argument of its counsel that it would not choose to have its association returned to it unless this court could require the defendants to make certain loans and guarantees made available to its successor, Fidelity Federal. However, after careful consideration of the jurisdictional limitations contained in the statute and the extraordinary nature of plaintiff's request, this court rules that such an order cannot be entered. While this court has the authority to order the FHLBB to remove the receiver and to return any assets that were wrongfully taken or subsequently transferred, it cannot sit in the position of a federal regulatory agency and determine whether future loans or other regulatory decisions should be made.

Therefore, in light of the statements made by plaintiff's counsel at oral argument, the court concludes that the federal receiver must be removed and the assets held by it (the claim against the Home Loan Bank of San Francisco and any net worth at the time of the takeover) returned to Fidelity.

IT IS SO ORDERED.

Appendix E

FEDERAL STATUTES

1. Principal substantive provisions of 12 U.S.C. § 1464 (d)(6) [incorporated by reference in 12 U.S.C. § 1729(c)(2)(3)] relating to receiverships over federally-chartered savings and loan associations.

(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, or in any other action, suit, or proceeding to which it is a party or in which it is interested, and in the administration of conservatorships and receiverships, the Board is authorized to act in its own name and through it own attorneys. Except as otherwise provided herein, the Board shall be subject to suit (other than suits on claims for money damages) by any Federal savings and loan association or director or officer thereof with respect to any matter under this section or any other applicable law, or rules or regulations thereunder, in the United States district court for the judicial district in which the home office of the association is located, or in the United States District Court for the District of Columbia, and the Board may be served with process in the manner prescribed by the Federal Rules of Civil Procedure.

* * * *

(d)(6)(A) The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound

practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Such proceedings shall be given precedence over other cases pending in such courts, and shall be in every way expedited. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

(B) In addition to the foregoing provisions, the Board may, without any requirement of notice, hearing, or other action, appoint a conservator or receiver for an association in the event that (i) the association, by resolution of its board of directors or of its members, consents to such

appointment, or (ii) the association is removed from membership in any Federal home loan bank, or its status as an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation is terminated.

(C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

(D) A conservator shall have all the powers of the members, the directors, and the officers of the association and shall be authorized to operate the association in its own name or to conserve its assets in the manner and to the extent authorized by the Board. The Board shall appoint only the Federal Savings and Loan Insurance Corporation as receiver for an associaton, and said Corporation shall have power to buy at its own sale as receiver, subject to approval by the Board. The Board may, without any requirement of notice, hearing, or other action replace a conservator with another conservator or with a receiver but any such replacement shall not affect any right which the association may have to obtain judicial review of the original appointment, except that removal under this paragraph (6) shall be the removal of the conservator or receiver in office at the time of such removal.

2. 12 U.S.C. § 1724(d)—Definition of Default

(d) The term "default" means an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured institution for the purpose of liquidation.

3. Principal Substantive Provisions of 12 U.S.C. § 1729 Governing Powers of FSLIC and Bank Board on default of a savings and loan association.

Powers of Corporation on default of Federal Savings and Loan Associations

(b) In the event that a Federal savings and loan association is in default, the Corporation shall be appointed as conservator or receiver and is authorized as such (1) to take over the assets of and operate such association, (2) to take such action as may be necessary to put it in a sound and solvent condition, (3) to merge it with another insured institution, (4) to organize a new Federal savings and loan association to take over its assets, or (5) to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default; and in any event the Corporation shall pay the insurance as provided in section 1728 of this title and all valid credit obligations of such association. The surrender and transfer to the Corporation of an insured account in any such association which is in default shall subrogate the Corporation with respect to such insured account, but shall not affect any right which the insured member may have in the uninsured portion of his account or any right which he may have to participate in the distribution of the net proceeds remaining from the disposition of the assets of such association.

Powers of Corporation and Federal Home Loan Bank Board on default of other institutions

(c)(1) In the event any insured institution other than a Federal savings and loan association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are tendered to the

court or other public authority having the power of appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) of this section with respect to Federal savings and loan associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 1728 of this title, and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.

(2) In the event the Federal Home Loan Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the terms "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed receiver of an insured institution pursuant to paragraph (2)—

(A) the provisions of section 1464(d) of this title shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to which the Corporation had been appointed receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

In connection with the liquidation of any such institution, the language "the court or other public authority having jurisdiction over the matter" in subsection (d) of this section shall mean said Board.

Additional powers of Corporation

(d) In connection with the liquidation of insured institutions in default, the Corporation shall have the power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

Reports and records

(e) The Corporation shall make an annual report to the Congress of the operation by it of insured institutions in default, and shall keep a complete record of the administration by it of the assets of such insured institutions which shall be subject to inspection by any officer of any such insured institution or by any other interested party, and, if any such insured institution is operated under the laws of any State, Territory, or possession of the United States, or of the District of Columbia, such annual report shall also be filed with the public authority which has jurisdiction over the insured institution.

Loans and purchases by Corporation

(f)(1) In order to prevent a default in an insured institution or in order to restore an insured institution in default to normal operation, the Corporation is authorized, in its discretion and upon such terms and conditions as it may determine, to make loans to, to purchase the assets of, or to make a contribution to, an insured institution or an insured institution in default.

(2) Whenever an insured institution is in default or, in the judgment of the Corporation, is in danger of default,

the Corporation may, in order to facilitate a merger or consolidation of such insured institution with another insured institution or the sale of the assets of such insured institution and the assumption of its liabilities by another insured institution and upon such terms and conditions as the Corporation may determine, purchase any such assets or assume any such liabilities, or make loans to such other insured institution, or guarantee such other insured institution against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of default.

(3) No contribution or guarantee shall be made pursuant to paragraphs (1) or (2) of this subsection in an amount in excess of that which the Corporation finds to be reasonably necessary to save the cost of liquidating such insured institution in or in danger of default but if the Corporation determines that the continued operation of such institution is essential to provide adequate savings or home financing services in its community, such limitation upon the amount of a contribution or guarantee shall not apply.

STATE STATUTES

1. Provisions of the California Financial Code.

§ 9001. Authority of commissioner to take possession of association; grounds

The commissioner may demand and take possession of the property, business and assets of an association if any of the following occur:

(a) The association does not comply with the order given pursuant to Section 9000, within the time specified therein.

(b) It appears to the commissioner that the association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors.

(c) The commissioner finds that the association's assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the amount set aside as a fixed and permanent capital of the association pursuant to Section 6456.1 of the Financial Code.

(d) The association refuses to submit its books, papers, and accounts to the inspection of the commissioner or any of his examiners, deputies, or assistants.

(e) Any officer of the association refuses to be examined upon oath concerning the affairs of the association.

§ 9002. Retention of possession

The commissioner may retain possession of the property, business and assets of an association until the association resumes business with the consent of and subject to the conditions imposed by the commissioner, or until its affairs are liquidated.

§ 9003. Judicial review

Whenever the commissioner takes possession of an association's property, business, and assets pursuant to this article, the association may within 10 days after the taking of possession commence an action in the superior court of the county in which the principal office of the association is located, to enjoin further proceedings. The court

after citing the commissioner to show cause why further proceedings should not be enjoined, hearing the allegations and proofs of the parties, and determining the facts, may upon the merits dismiss such action, or enjoin the commissioner from further proceedings and direct him to surrender the business, property, and assets to the association.

§ 9004. Appeal; stay of judgment

An appeal from a judgment enjoining the commissioner from further proceedings and directing him to surrender the business, property, and assets to the association does not operate as a stay of the judgment, unless the trial court in its discretion so orders. If an appeal from the judgment is taken by the commissioner no bond need be given. If the judgment dismisses the action an appeal therefrom does not operate as a stay of the judgment but the court rendering such judgment may, in its discretion enjoin the commissioner pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property, and assets to the association, if a bond is given as required by Chapter 2 (commencing with Section 916), Title 13, Part 2 of the Code of Civil Procedure.

§ 9005. Refusal to comply with commissioner's demand for possession; misdemeanor; penalty

Whenever the commissioner demands possession of the property, business, and assets of any association, pursuant to this part, the refusal of any officer, agent, employee, or director of such association to comply with the demand is a misdemeanor, punishable by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail for not more than 90 days, or by both such fine and imprisonment.

§ 9007. Schedule of property, assets, and collateral; examination of association officers and employees under oath

When the commissioner takes possession of the property, business, and assets of any association, the president and secretary of such association shall make a schedule of all its property, assets, and collateral held by it as security for loans and make an oath that such schedule sets forth all such property, assets, and collateral. The president and secretary shall deliver the schedule, and the possession of all property, assets, and collateral not previously delivered to the commissioner. The commissioner may at any time examine under oath any president, secretary, officer, director, agent or employee of the association, to determine whether or not all such property, assets, or collateral have been transferred and delivered into his possession.

§ 9008. Repealed by Stats.1971, c. 258, p. 414, § 25

§ 9009. Custodian, receiver or liquidator; appointment; bond

When the commissioner takes possession of the business, property, and assets of an association, he may appoint a custodian, receiver, or liquidator. The commissioner may require a good and sufficient bond for the custodian, receiver, or liquidator and place him in charge as his representative.

§ 9010. Collection of money; conservation of business, property, and assets

When the commissioner takes possession of the property, business, and assets of an association, he may collect all money due to such association and give receipt therefor. The commissioners may do such other acts as are necessary

or expedient to collect, conserve, or protect the association's business, property, and assets.

§ 9011. Liquidation

Unless the commissioner is enjoined from further proceedings and directed to surrender the business, property, and assets of an association, or unless such association shall with the consent of the commissioner resume business, the commissioner shall proceed to liquidate the affairs of the association as provided in Article 2 of this chapter.

§ 9012. Powers of commissioner in possession

If the commissioner is in possession of the business, property, and assets of an association, whether or not he is liquidating the affairs of such association, the commissioner may:

(a) Judicial confirmation of actions. Apply to the superior court of the county in this State in which the principal office of the association is located for an order confirming any action taken by the commissioner, or authorizing the commissioner to do any act or execute any instrument not expressly authorized by this part. The order shall be given after a hearing on such notice as the court prescribes.

(b) Payment of secured claims. Pay and discharge any secured claims against the association, whether or not such claims have been presented for payment or have become barred from presentation by the expiration of the time limit specified in Article 2 of this chapter. No secured claim shall be paid in an amount larger than the value of the security at the time of payment.

(c) Payment of expenses. Pay administrative or current expenses incurred prior to the taking of possession

which are necessary or convenient to the orderly or economic liquidation or preservation of the assets, and pay all wages or salaries, not exceeding two hundred fifty dollars ($250) per month to any one person, earned within six months prior to the taking of possession, whether or not claims for such expenses, wages, or salaries have been presented for payment, or shall have become barred from presentation by the expiration of the time limit specified in Article 2 of this chapter.

(d) Disaffirmance of executory contracts. Disaffirm any executory contracts, including leases, to which the association is a party, and disaffirm any partially executed contracts, including leases, to the extent that they remain executory. The disaffirmance shall be made within six months after obtaining knowledge of the existence of the contract or lease.

§ 9013. Claim for damages on disaffirmed contract

Claims for damages resulting from the disaffirmance of an executory contract or lease by the commissioner may be filed and allowed. No claim of a landlord for damages resulting from the disaffirmance of an unexpired lease of real property or under any covenant of such lease shall be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year succeeding the date of the surrender of the premises plus the amount of any unpaid accrued rent without acceleration. Any such claim must be filed within 30 days of the date of such disaffirmance or within the time that claims must be filed under Sections 9051 and 9052, whichever is longer.

§ 9050. Inventory

When the commissioner determines to liquidate an association, he shall cause an inventory of all the assets of the association to be made in duplicate, file the original with the court, and file the duplicate in his office.

§ 9051. Notice of liquidation; publication; mailing to creditors and investors

When the commissioner determines to liquidate an association he shall cause notice to be given by publication once a week for four successive weeks in some newspaper of general circulation published at or near the principal place of business in this State of such association, to all persons having claims against the association as creditors, investors, or otherwise, requiring them to present and file their claims and make legal proof thereof at a place and within a time designated in such publication. The time shall be not less than six months after the first publication. Within 10 days after the first publication the commissioner shall cause a copy of such notice to be mailed to all persons whose names appear of record upon the association's books as creditors or investors.

§ 9025. Claims; time for filing; effect of failure to file

All claims, demands, or causes of action of creditors, and persons other than investors against the association or against any property owned or held by it in trust or otherwise, must be presented to the commissioner in writing, verified by the claimant, or someone in his behalf, within the period specified in the notice for the presentation of claims, whether or not an action is pending to enforce any such claim or demand. The commissioner shall not approve any claim not so presented, and any

such claim, demand or cause of action not so presented is forever barred.

§9053. Schedule of claims; filing

Upon the expiration of the time fixed for the presentation of claims, the commissioner shall prepare in duplicate a full and complete schedule of all claims presented, specifying by classes, those that have been approved and those that have been disapproved and shall file the original with the court and the duplicate in his office.

§ 9054. Notice to claimants of rejected claims; limitation of actions

Not later than five days after the time of filing the schedule of claims with the court, written notice shall be mailed to all claimants whose claims have been rejected. Action to enforce the payment of or to establish any rejected claim must be brought and service had within four months from and after the date of filing of the schedule of claims with the proper court or all such actions are forever barred.

§ 9055. Investor's right to declared dividend

Any investor, without presenting a claim, is entitled to any dividends declared, to the extent and in the proper relative order of priority, of any claim shown by the books of the association to exist in his favor against the association.

§ 9055.5. Interest on claims

Claims of holders of investment certificates and of shares shall bear interest, from the date when interest or dividends were last paid or credited on such certificates or shares, at the rate or rates of return on investment

certificates and shares determined from time to time by the commissioner to be the rate or rates of return on investment certificates or shares paid or credited for the period or periods in question by the largest number of associations in this State. Claims of other creditors shall bear interest at the rate provided by law on judgments from the date the commissioner takes possession of the business, property and assets of the association.

§ 9056. Stay and dissolution of pending actions and attachments

The determination by the commissioner to liquidate any association, evidenced by filing written notice of such determination with the court, operates to stay or dissolve all actions or attachments instituted or levied within 30 days next preceding the taking of possession of such association by the commissioner, and pending the process of liquidation, no attachment or execution shall be levied or lien created upon any of the property of the association.

§ 9057. Special deputies; appointment to assist in liquidation; payment of expenses

The commissioner may appoint one or more special deputies to assist in the duties of liquidation and distribution under his direction and may also employ such special legal counsel, accountants, and assistants as may be needed and required and fix their salaries and compensation. All such salaries and compensation with other reasonable and necessary expenses as may be incurred in the liquidation shall be paid by the commissioner from the funds of the association in his hands. Such expenses shall include, among other things, that part of the salary of the commissioner and of his deputies, examiners, accountants, ap-

praisers, and other assistants, and that part of the general expenses of the commissioner's office, as fairly represent, in the opinion of the commissioner, the proportion properly attributable to such liquidation.

§ 9058. Liquidation powers of commissioner

In liquidating the affairs of an association the commissioner may:

(a) Collect all money due to, and claims of, the association and give receipt therefor.

(b) Release or reconvey all real or personal property pledged, hypothecated, or transferred in trust as security for loans.

(c) Approve and pay all just and equitable claims.

(d) Commence and prosecute all actions and proceedings necessary to enforce liquidation.

(e) Compound bad or doubtful debts or claims, borrow money, sell, convey, or transfer real or personal property, on order of the superior court of the county in this State in which the principal office of the association is located. The order shall be made after hearing and on such notice as the court prescribes.

§ 9059. Judicial hearings on disposition of property

Notwithstanding any other law of this state, the judge of the superior court of the county in this state in which the principal office of an association is located, may whenever he deems it necessary or advisable, hold hearings relating to the sale, exchange, or other disposition of any real property or any personal property of the association regardless of the location of such property. The hearings shall be held at the county seat of any county in this state or at such

places in the home county of such superior court at which sessions are held as provided in the Code of Civil Procedure.

§ 9060. Expenses of hearing

When it is necessary for a judge, clerk, deputy clerk, court reporter, or bailiff of a superior court to travel to another county for hearings relating to the sale, exchange or other disposition of real or personal property of an association, each such judge, clerk, deputy clerk, court reporter, or bailiff shall be allowed his necessary expenses in going to, returning from, and attending upon the business of the court. The expenses shall upon order of the court, be a charge against the funds of the association and paid out of such funds by the commissioner.

§ 9061. Suits on doubtful debts or claims

If a purchaser for any property or any bad or doubtful debt or claim of an association cannot be obtained and it appears improbable that recovery thereon can be had, and that the cost of action to enforce collection of the same would probably be lost, the superior court may direct that suit on the debt or claim need not be brought.

§ 9062. Abandonment of property

If it appears improbable that anything can be realized from any property of the association and that the cost of maintaining, preserving, or protecting the property would probably be lost, the court may direct the commissioner to abandon the property.

§ 9063. Powers of commissioner; lawsuits; execution of instruments

For the purpose of executing and performing any of the powers and duties conferred upon him by this article, the commissioner may in the name of the association or in his own name prosecute and defend any suit or other legal proceeding and may in the name of the association or in his own name as commissioner execute, acknowledge, and deliver any and all deeds, assignments, releases, requests for reconveyance, and other instruments necessary and proper to effectuate any sale of real or personal property or other transaction in connection with the liquidation of the association. Any deed, assignment, release, request for reconveyance, or other instrument executed pursuant to this section is valid and effectual for all purposes as though it was executed by the officers of such association with the authority of its board of directors.

§ 9064. Sale of realty; recordation of court order authorizing or confirming sale

If any real property of the association sold by the commissioner is located in a county other than the county in which the application to the court for permission to sell the property was made, the commissioner shall cause a certified copy of the order authorizing or ratifying such sale to be recorded in the office of the recorder of the county in which the real property is located.

§ 9065. Acceptance of approved claims

The commissioner with the approval of the court after a hearing on such notice as the court prescribes, may accept approved claims against an association in his possession for liquidation in partial or full payment for real

property of the association, where the approved claims are based on any of the following:

(a) Investment certificates.

(b) Shares, if the association had prior to August 21, 1933, granted the shareholders the right and option to exchange their shares for investment certificates of equal value, issued by the association.

(c) General creditors' claims.

§ 9066. Surrender values of approved claims; cancellation

Claims received in payment pursuant to Section 9065 shall be accepted at their respective surrender values as estimated by the commissioner and as fixed and determined by the court. All such claims shall be canceled.

§ 9067. Loans held by association; reduction of interest rate; extension; reduction of installments; rewriting; additional advances

The commissioner may reduce the rate of interest to be paid on any loan held by an association in liquidation, to a rate not less than 7.2 percent a year. The commissioner may renew, extend the time of payment of, reduce the amount of the monthly payments of, or rewrite any such loan. The commissioner may make additional advances for the purpose of preserving the security of any such loan.

§ 9068. Payment of claims of less than $10

In liquidating the affairs of an association the commissioner shall first pay from the net realization of assets in excess of salaries, compensation, and expenses of the

commission and his appointees, all claims approved by him in the sum of less than ten dollars ($10), other than the claims of shareholders or stockholders, and other than the claims of certificate holders or other creditors who object in writing to such payment. The claims of less than ten dollars ($10) shall be paid at their surrender value as estimated by the commissioner and as fixed and determined by the court on the same basis as claims are received in payment of real property as provided for by Section 9066. All such claims shall be canceled.

§ 9069. Payment of claims of $10 or more

After complying with Section 9068 the commissioner shall pay all claims approved in the sum of ten dollars ($10) or more, other than the claims of shareholders and stockholders, without distinction or preference as between the claims of certificate holders and other creditors except as provided in Section 9055.5 as to the respective rates of interest thereon. Thereafter the commissioner shall distribute and pay dividends in liquidation first to the shareholders until their claims are fully paid or such assets or funds are exhausted, and second, if any such assets or funds remain, to the stockholders until such assets or funds are exhausted. In the case of any association in which shareholders were prior to August 29, 1933, granted the right and option by the association to exchange their shares for investment certificates of equal value the commissioner shall distribute and pay dividends in liquidation to such shareholders without distinction or preference as between the claims of such shareholders and the claims of certificate holders and other creditors.

§ 9070. Available funds for payment of claims

The distributions in Sections 9068 and 9069 shall be made when funds are available therefor to the extent of 10 percent or more of the approved claims of the class of claimants then entitled to distribution, and shall continue until all the assets have been realized upon and a final dividend in liquidation is declared and paid.

§ 9071. Disposition of surplus

When the commissioner has (a) fully liquidated all claims other than claims of stockholders, and (b) made due provision for any and all known but unclaimed liabilities, excepting claims of stockholders, and (c) paid all expenses of liquidation, then upon the written request of the holders of a majority of the stock of such association he shall deliver to the association or its trustees any surplus that then remains in his hands, together with all the records and effects. The association or its trustees shall have title to such surplus, records, and effects free from any claim of the commissioner.

§ 9072. Final statement of liquidation; filing

Upon the payment of a final dividend in liquidation, the commissioner shall prepare and file with the court a full and final statement of the liquidation, including a summary of the receipts and disbursements, and a duplicate of such statement shall be filed in the office of the commissioner. After hearing and approval by the court, the liquidation shall be closed.

§ 9073. Court order of approval; unclaimed dividends; deposit with state treasurer

In making its order approving the commissioner's final statement of the liquidation of an association, the court

shall determine the amounts of the liquidating dividends to which claimants and investors are entitled but which then remain unpaid or unclaimed in the hands of the commissioner. The order of the court shall direct the commissioner to deposit such amo. nts with the State Treasurer. All amounts so deposited shall be deemed to be deposited in the State Treasury under the provisions of Chapter 7 (commencing with Section 1500) of Title 10 of Part 3 of the Code of Civil Procedure, and shall be subject to claim or other disposition as provided in said Chapter 7 (commencing with Section 1500) of Title 10.

§ 9074. Disposition of books and records; dissolution of association

The order of the court approving the final statement on liquidation shall provide for the destruction or other disposition of the books and records of the association or pertaining to the liquidation of the association, and the court may declare the association dissolved as a corporation.

Cross References

§ 9100. Insured association defined

"Insured association" as used in this article means any association which has insurance protection provided by Title IV of the National Housing Act[1] as now or hereafter amended.

§ 9101. Federal savings and loan insurance corporation as custodian, receiver, or liquidator

The Federal Savings and Loan Insurance Corporation may act without bond as sole or joint custodian, receiver, or liquidator of any insured association which has taken

[1] 12 U.S.C.A. § 1724 et seq.

over for liquidation pursuant to the provisions of this chapter.

§ 9102. Tender of appointment

The commissioner in the event of the taking over of any insured association for liquidation, may tender to the Federal Savings and Loan Insurance Corporation the appointment as sole custodian, receiver, or liquidator thereof, or may tender to the corporation the appointment as cocustodian, coreceiver, or coliquidator thereof jointly with the commissioner.

§ 9103. Powers

If the Federal Savings and Loan Insurance Corporation accepts the appointment mentioned in Section 9102, the corporation shall equally have and possess all the powers and privileges provided by the laws of this State with respect to the commissioner upon his taking possession of an association, and shall be subject to all the duties of the commissioner, and in addition shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted. The corporation may make loans on the security of, or may bid for or purchase at public or private sale, or at any custodian's, receiver's or liquidator's sale, or may liquidate or sell, any part of the assets of the association of which it is the sole or joint custodian, receiver, or liquidator. If the corporation purchases any such assets, it shall bid and pay a fair and reasonable price.

§ 9104. Subrogation; rights of investors and creditors

Whether or not the Federal Savings and Loan Insurance Corporation serves as sole or joint custodian, receiver, or liquidator, of any insured association, whenever it pays or

makes provision for payment of the liabilities of any insured association in liquidation, it is subrogated, upon the surrender and transfer to it of any investment certificate, share, or account insured by it, to all rights of the holder with respect to such investment certificate, share, or account. The surrender and transfer of such investment certificate, share, or account does not affect any right which the transferor thereof may have in any portion of such investment certificate, share or account which is uninsured, or any right to participate in the distribution of the net proceeds remaining from the distribution of the assets of such insured association. The rights of the investors in, and creditors of, such insured association shall be determined in accordance with the applicable provisions of the laws of this State.

Office-Supreme Court, U.S.
FILED
APR 9 1983
CLERK

No. 82-1320

In the Supreme Court of the United States

OCTOBER TERM, 1982

FIDELITY SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS P. VARTANIAN
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the statutory requirements (12 U.S.C. 1729 (c)(2)(A) and (C)) for the appointment of a federal receiver for a state-chartered savings and loan association had been satisfied.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-25) is reported at 689 F.2d 803. The opinions of the district court (Pet. App. A-26 to A-54) are reported at 540 F. Supp. 1374.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1982 (Pet. App. A-25). A petition

for rehearing was denied on November 8, 1982 (Pet. App. A-1). The petition for a writ of certiorari was filed on February 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from the appointment of the Federal Savings and Loan Insurance Corporation ("FSLIC") as federal receiver for petitioner, a state-chartered savings and loan association. The district court held that the Federal Home Loan Bank Board ("Bank Board")[1] failed to comply with the statutory requirements of 12 U.S.C. 1729(c)(2)(A) and (C) when it appointed FSLIC as federal receiver. The court of appeals reversed (Pet. App. A-25), concluding that these requirements had been satisfied. It remanded (*ibid.*) for further proceedings on other issues in the case.

2. As both the district court (Pet. App. A-35) and the court of appeals (*id.* at A-3) noted, the financial difficulties that led to petitioner's receivership began in 1979 as a result of speculative loan commitment practices. Petitioner "gambled" that interest rates would fall and made commitments, in exchange for a commitment fee, to fund future loans at fixed rates

[1] The Bank Board is an independent agency of the Executive Branch of the United States that is responsible, pursuant to Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. V) 1464, for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. (Supp. V) 1464(a). The Bank Board is also the operating head of FSLIC, the corporate governmental agency of the United States that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. (& Supp. V) 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

(*id.* at A-34 to A-35). When interest rates rose sharply instead, petitioner was forced to borrow at much higher rates in order to fund its low-interest loan commitments (*id.* at A-35). As a result, petitioner began to suffer substantial operating losses and a decline in net worth.[2] By March 1982, petitioner had borrowed in excess of $1.3 billion from its lender of last resort, the Federal Home Loan Bank of San Francisco ("Home Loan Bank").[3] *Ibid.* By contrast, the total of all savings deposited with petitioner at this time was $1.407 billion.

In early April 1982, the 1981 financial report for petitioner's parent corporation, Fidelity Financial Corporation, a publicly traded stock corporation, was

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[2] The state commissioner's order seizing petitioner recognized that the net worth of petitioner had eroded from $91.6 million, as of January 1, 1981, to only $19.6 million as of March 31, 1982, and that petitioner's net operating losses had increased from $1.4 million for the year ended December 31, 1980, to $57 million for the year ended December 31, 1981. Pet. App. A-5 n.2.

[3] Each of the 12 Home Loan Banks is an independent lending institution, created under the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. V) 1421 *et seq.*, the stock of which is owned by member savings and loan associations located within its district. The management of the Home Loan Bank is vested in a board of directors, the majority of whom are elected by member institutions. 12 U.S.C. 1427(a). The decision by the Home Loan Bank whether to make an advance (or loan), while subject to the general requirements set forth in 12 U.S.C. (& Supp. V) 1430 and 12 C.F.R. 525.1 *et seq.*, is not unlike the decision made by any lender. The Home Loan Bank evaluates the financial condition of the borrower, the sufficiency of the proposed collateral, the extent of previous loans and other relevant criteria. Based upon its independent evaluation, the Home Loan Bank decides whether and under what conditions to make advances to its members.

released. Fidelity Financial Corporation's independent auditors qualified their opinion by concluding that petitioner could not continue to operate unless it merged with another financial institution or obtained substantial financial assistance from FSLIC. Depositors, alarmed by this information, withdrew nearly $70 million from petitioner during the week of April 5, 1982 (Pet. App. A-4).

Meanwhile, the Home Loan Bank had become concerned about its large advances to petitioner and the adequacy of collateral that could be pledged for further loan requests. On April 9, 1982, the Home Loan Bank decided not to make any additional loans to petitioner absent an assurance from FSLIC that FSLIC would guarantee such loans (Pet. App. A-4). FSLIC declined to make such guarantees, and so informed the Home Loan Bank and the California Savings and Loan Commissioner. Without this source of funding, petitioner faced an immediate liquidity crisis. *Ibid.*

In view of these developments, shortly before the close of business on April 13, 1982, the California Commissioner, having concluded that petitioner was "(1) [i]n an unsafe condition; (2) [c]onducting its business in an unsafe manner; [and] (3) [c]onducting its business in an injurious manner * * *," issued an order seizing petitioner and tendering appointment to FSLIC as state receiver for the purpose of liquidation (Pet. App. A-4 n.2, A-7 n.3). Shortly after these orders were delivered to petitioner, FSLIC as state receiver went about the task of closing the association (Tr. 136-139). The Bank Board then appointed FSLIC as federal receiver pursuant to 12 U.S.C. 1729(c)(2), concluding that petitioner was in an unsafe and unsound condition to transact business, was insolvent, and had suffered a substantial dissipation

of its assets due to violations of federal regulations and unsafe and unsound practices (Pet. App. A-7). Petitioner's assets were transferred to a newly created federal mutual association, Fidelity Federal Savings and Loan Association of San Francisco ("Fidelity Federal"), so that the business could be continued, albeit in another form, pending negotiation of some form of consolidation with another institution (*id.* at A-8; see 12 U.S.C. 1729(b)(4)).[4] After more than four months of negotiations with several institutions and pursuant to a bidding process, Fidelity Federal was acquired by Citicorp, N.A. The association is now operating as Citicorp Savings and Loan Association, a federal association.

3. Petitioner commenced this action in the United States District Court for the Northern District of California challenging the Bank Board's action pursuant to 12 U.S.C. 1464(d)(6). Following an order bifurcating the trial (Pet. App. A-33), the district court concluded that the requirements of 12 U.S.C. 1729(c)(2)(A) and (C) had not been satisfied (Pet. App. A-39 to A-49). Specifically, the court found that petitioner had not been "closed" under state law and that no depositor had been unable to withdraw funds (*id.* at A-43 to A-44, A-47 to A-48). Having found the federal receivership invalid on these procedural grounds, the court did not address the substantive merits of the Bank Board's action.

The respondents appealed to the Ninth Circuit pursuant to 28 U.S.C. 1292(b). The court of appeals reversed, concluding that the procedural prerequisites for the appointment of FSLIC as federal receiver had

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[4] The practical effect of the appointment of the federal receiver was to gain time for the Bank Board to seek a solution to the problem less drastic than liquidation.

been satisfied. First, the court of appeals rejected petitioner's claim that the state commissioner lacked the authority to close the association. Relying on California statutory and decisional law, the court held (Pet. App. A-13) that "[t]he power to close an association surely is among the powers properly implied from the Commissioner's power to take possession of an association for the purpose of liquidation." The court relied on *Evans* v. *Superior Court*, 20 Cal. 2d 186, 190-191, 124 P.2d 820, 822-823 (1942) (*Evans II*); *Evans* v. *Superior Court*, 14 Cal. 2d 563, 572, 96 P.2d 107, 113 (1939), appeal dismissed, 309 U.S. 640 (1940) (*Evans I*); *Wilson* v. *Superior Court*, 2 Cal. 2d 632, 635-637, 43 P.2d 286, 287-288 (1935). The court held, moreover (Pet. App. A-18), that the state commissioner's order seizing petitioner and appointing FSLIC as receiver, combined with the order of liquidation, satisfied the closure requirement of 12 U.S.C. 1729(c)(2)(A). The case was remanded to the district court for further proceedings on the substantive issues. Pet. App. A-25.

ARGUMENT

The issues raised in the petition were fully considered and correctly decided by the court of appeals. Its decision does not conflict with any decision of this Court or of any other court of appeals. Indeed, the only other court of appeals that has decided the question presented here expressly followed the Ninth Circuit decision in this case. *Telegraph Savings & Loan Association* v. *Schilling*, No. 80-2012 (7th Cir. Mar. 29, 1983). Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 15-16) that the procedural requirements for appointment of a federal re-

ceiver had not been satisfied because petitioner was not "closed" by the state authorities and because petitioner had not denied the request of a depositor for withdrawal of funds. These contentions have no merit.

a. Petitioner's argument that the statutory requirement of a closing was not met is based on two assumptions: that the state authorities lacked the power to close the association and that the actions taken on April 13 occurred so near to the end of petitioner's regular business day that they did not constitute a "closing." Neither contention warrants further review. The first raises an issue of state law that the court of appeals found to be settled by the California Supreme Court. *Evans II*, *supra*; *Evans I*, *supra*; *Wilson* v. *Superior Court*, *supra*; see Pet. App. A-13. The second is a fact-bound matter that was correctly resolved below and that does not merit this Court's review. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, petitioner's argument misconstrues the statutory scheme that was designed to permit federal assistance for troubled savings and loan associations with a minimum dislocation of banking activities. Contrary to petitioner's contention, Congress did not intend that a more significant disruption of service than occurred here was required before a federal receiver could be appointed. The court of appeals recognized that if such a severe dislocation were required to precede federal action, it would impose an unnecessary risk of depositor panic and a threat to the savings and loan industry. Accordingly, the court concluded (Pet. App. A-21) that Congress intended

to create a mechanism to achieve a smooth transition of control without a substantial negative impact on petitioner's customers and on the public in general. Indeed, it was precisely this type of responsible approach to a financial crisis that Congress envisioned in 1968 when it expanded the Bank Board's authority over state institutions. See *Telegraph Savings & Loan Association* v. *Schilling*, *supra*, slip op. 10 ("[t]hus, what Telegraph characterizes as a sham proceeding was merely the cooperative effort of state and federal authorities to protect depositors while at the same time minimizing FSLIC's liability"); S. Rep. No. 90-1263, 90th Cong., 2d Sess. (1968).

b. For similar reasons, the court of appeals rejected petitioner's argument that an account holder's request for withdrawal of funds must actually be denied before a federal receiver may be appointed. As the court noted, in the circumstances of this case petitioner's depositors were in fact unable to withdraw funds (Pet. App. A-24). This is all the statute requires. See 12 U.S.C. 1729(c)(2)(C); *Telegraph Savings & Loan Association* v. *Schilling*, *supra*, slip op. 10-13.

2. Petitioner claims (Pet. 19-27) that the court of appeals' decision contravenes principles of comity and federalism. This contention is wholly misplaced in a case involving cooperative efforts between state and federal authorities. The absence of any friction between state and federal regulation in these circumstances is demonstrated by the amicus curiae brief filed in the court of appeals by the Attorney General of California, who fully supported the actions taken by the federal respondents. See also Pet. App. A-20 to A-21.

Moreover, the court of appeals was fully cognizant of the state's interest in the regulatory scheme [5] and clearly noted that its holding preserved the state's role in the receivership process (Pet. App. A-23):

> Our interpretation also does no harm to the states. The appropriate state authority need not promulgate the liquidation order nor appoint the FSLIC as receiver. The fact that the Board may urge strongly that the state authority issue these orders alters nothing. It is within the state's power to refuse and to force into existence the literal fulfillment of the closure and inability to withdraw preconditions to federal intervention. That this might be a very imprudent thing for the state to do merely strengthens the case for the interpretation we give the statute.

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[5] At the time FSLIC was appointed federal receiver of petitioner, 12 U.S.C. 1729(c)(2) required that action be taken by state authority before the Bank Board could appoint a federal receiver for a state-chartered association. The relevant statute recently was amended by the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), 96 Stat. 1482 ("Garn-St Germain Act"), to permit the Board to appoint the FSLIC as federal receiver of a state-chartered association whenever it determines that any of the grounds specified in 12 U.S.C. 1464(d)(6)(A)(i), (ii), or (iii) exists, regardless of any technical closing of the institution, provided the Board has received the prior written approval of the state official having jurisdiction over the institution, or provided said state official has failed to respond within 90 days to notice of the Board's determination that such grounds exist. This new section, to be codified at 12 U.S.C. 1729(c)(1)(B)(ii)(II), will remain in effect at least until October 15, 1985. Section 122(d), 96 Stat. 1482, of the Garn-St Germain Act. Thus, at least until that date, it is unlikely that the issues raised in this litigation will arise again.

3. The questions presented by the petition are, in any event, not ripe for consideration by this Court. The case is now on remand to the district court for a review of the substantive merits of the Bank Board's action. Trial is scheduled for October 1983. Should petitioner prevail at trial, the procedural issues will be moot. As a matter of judicial economy, the petition should be denied so that the proceedings in the district court may reach final resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

THOMAS P. VARTANIAN
General Counsel
Federal Home Loan Bank Board

APRIL 1983

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